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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR CORNING GLASS WORKS,
Petitioner in No. 73-29 and Respondent in No. 73-695

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR CORNING GLASS WORKS

Pursuant to an Order of this Court entered on December 17, 1973, Corning Glass Works' petition for a writ of certiorari was granted to review a judgment of the Court of

Appeals for the Second Circuit in case No. 73-29[1] and that case was consolidated with case No. 73-695[2] as to which the Secretary of Labor's petition for a writ of certiorari was granted to review a judgment of the Court of Appeals for the Third Circuit.

The Court of Appeals for the Second Circuit decided the three Questions Presented, Brief *infra* at 4, unfavorably to Corning Glass Works (hereinafter "Corning"). The Court of Appeals for the Third Circuit decided the first of the "Questions Presented" favorably to Corning and accordingly did not reach other questions in that case.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 474 F.2d 226 and is printed at App. (2d Cir.) 195. The opinions of the United States District Court for the Western District of New York are reported at 319 F.Supp. 1161 and 330 F.Supp. 46 and respectively printed at App. (2d Cir.) 145 and 180.

The opinion of the United States Court of Appeals for the Third Circuit is reported at 480 F.2d 1254 and is printed at App. (3d Cir.) 195. The opinion and supplemental findings of the United States District Court for the Middle District of Pennsylvania are reported at 341 F.Supp. 18 and printed at App. (3d Cir.) 175.

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[1] App. (2d Cir.) 217. The abbreviation "App. (2d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-29. The abbreviation "App. (3d Cir.)" is used herein to refer to the printed Appendix filed pursuant to Supreme Court Rule 36, regarding case No. 73-695.

[2] App. (3d Cir.) 210.

Jurisdiction

The judgment[3] of the Court of Appeals for the Second Circuit, favoring the Secretary of Labor, was entered on February 2, 1973. On April 18, 1973, Mr. Justice Marshall extended to July 2, 1973, the time for filing a petition for a writ of certiorari. Corning Glass Works' petition was filed on June 29, 1973, and was granted on December 17, 1973.[4] The jurisdiction of this Court to review the judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court for the Western District of New York existed by virtue of 29 U.S.C. § 217.

The judgment[5] of the Court of Appeals for the Third Circuit, favoring Corning Glass Works, was entered on June 28, 1973. On September 17, 1973, Mr. Justice Brennan extended to October 26, 1973, the time for filing a petition for a writ of certiorari. The Secretary of Labor's petition was filed on October 26, 1973, and was granted on December 17, 1973.[6] The jurisdiction of this Court to review the judgment of the Court of Appeals for the Third Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the United States District Court for the Middle District of Pennsylvania existed by virtue of 29 U.S.C. § 217.

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[3] App. (2d Cir.) 216.

[4] App. (2d Cir.) 217.

[5] App. (3d Cir.) 209.

[6] App. (3d Cir.) 210.

Questions Presented

I. Whether work on a steady night shift is performed under a "working condition" similar to work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The Second Circuit Court of Appeals answered "yes."

The Third Circuit Court of Appeals answered "no."

II. Whether, when a prior violation of the equal pay provisions of the Fair Labor Standards Act has occurred due to exclusion of women from higher paying jobs (here the steady night shift) and the employer has opened those higher paying jobs to women without reducing any employee's wage rate, the employer nevertheless is still in violation of the Act by reason of the prohibition in the Act against the reduction of wages in order to come into compliance.

The Second Circuit Court of Appeals answered "yes."

III. Whether the equal pay provisions of the Fair Labor Standards Act prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

The Second Circuit Court of Appeals answered "yes."

Statute Involved

The statute involved is as follows:

Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1):

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

Statement

I. The nature of the proceedings

These cases arise out of actions brought by the Secretary of Labor seeking to enjoin alleged violations of the equal pay provisions of the Fair Labor Standards Act and to recover wages allegedly due employees in accordance with the provisions of Section 17 of the Act.

The sole basis for these actions is the fact that Corning Glass Works ("Corning"), at two manufacturing plants located in Corning, New York, (case No. 73-29) and at a

manufacturing plant located in Wellsboro, Pennsylvania, (case No. 73-695), has paid certain inspector job classifications more money for work on a steady night shift than for work on jobs having the same titles on day shifts.

II. The historical development of the wage rates of the jobs involved in these cases

The historical development of the wage rates of the jobs involved in each of the cases here considered has been remarkably similar.

The pay practices at the core of these disputes originated between 1925-30 when Corning introduced automatic production equipment which made it necessary for the first time to employ inspectors on a steady night shift.[7]

At that time, and for many years thereafter, the laws of both Pennsylvania and New York prohibited the employment of women between 10:00 p.m. and 6:00 a.m.[8] Thus, Corning established steady night shifts, at both its Corning, New York, and Wellsboro, Pennsylvania, plants, to work from 10:00 p.m. to 6:00 a.m., which employed only men.[9]

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[7] App. (2d Cir.) 150, Western District of New York Finding of Fact (These Findings of Fact are hereinafter abbreviated W.D. N.Y. F.F.; they were unnumbered findings.). App. (3d Cir.) 182, Middle District of Pennsylvania Supplemental Finding of Fact No. 2 (The Supplemental Findings of Fact are hereinafter abbreviated M.D. Pa. Supp. F.F.; the Findings of Fact are hereinafter abbreviated M.D. Pa. F.F.).

[8] App. (2d Cir.) 150, W.D. N.Y. F.F.; Law of March 30, 1927, ch. 453, § 172 (1927) N.Y. Laws; Law of April 28, 1930, ch. 868, § 172 (1930) N.Y. Laws (which carried forward, without change, the prohibitions against night work by females). App. (3d Cir.) 182, M.D. Pa. Supp. F.F. No. 3; Pennsylvania Act of July 25, 1913, P.L. 1024.

[9] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 182, M.D. Pa. Supp. F.F. No. 3.

In those days Corning did not pay a formal shift differential to compensate employees for working undesirable hours and, in order to obtain men to perform inspection work on a steady night shift, Corning had to pay a higher rate than had been paid for work during the day.[10]

This practice continued until World War II when manpower shortages caused Corning to be permitted to employ women on the steady night shift inspection jobs at both the Corning, New York, and the Wellsboro, Pennsylvania, plants. The district court in the New York case found that women who performed the steady night shift jobs during World War II were paid the higher steady night shift wage rates—the same wage rate paid to men working as inspectors on that shift.[11]

In 1944, the American Flint Glass Workers' Union organized the production and maintenance employees of the Corning, New York, and Wellsboro, Pennsylvania, plants.[12] Collective bargaining agreements were negotiated which, for the first time, made formal provisions for a steady night shift differential over and above the base wage rates paid steady night shift jobs.[13] These labor agreements did not reduce the wage rates of jobs and the pre-existing wage difference between steady night work and day work continued in effect.[14] Thus, the contracts

[10] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 183, M.D. Pa. Supp. F.F. Nos. 5-6.

[11] App. (2d Cir.) 150-51, W.D. N.Y. F.F. No one could remember how people were paid at the Wellsboro plant during World War II, thus, the record in that case is silent on this point.

[12] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 183-84, M.D. Pa. Supp. F.F. No. 11.

[13] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. No. 12.

[14] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. No. 13.

included the historical steady night shift differential which had been built into the base rate and a separately designated steady night shift premium which the union had negotiated.

After World War II Corning ceased to employ women on the steady night shift in accordance with the requirements of both New York and Pennsylvania law.[15]

Between 1944 and 1969 Corning and the union negotiated a series of contracts, covering the employees at the Corning, New York, and Wellsboro, Pennsylvania, plants, which maintained the higher wage rate for steady night shift work along with a separately designated premium for such work.[16]

III. Corning's efforts to achieve equal treatment of women and men

The pattern of the legislation which precluded women from working at night was strikingly similar in both New York and Pennsylvania.

The Pennsylvania law was amended in 1947 to permit women to work at night conditioned upon the approval of the State Department of Labor. The State regulations required that, in order to be permitted to employ women at night, an employer was required to furnish transportation where public transportation was not available.[17]

The Pennsylvania district court found that public transportation has not been available in Wellsboro, Pennsylvania, and that it has not been economically feasible for

[15] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. F.F. No. 5.

[16] App. (2d Cir.) 151, W.D. N.Y. F.F.; App. (3d Cir.) 184, M.D. Pa. Supp. F.F. Nos. 12-14.

[17] App. (3d Cir.) 183, M.D. Pa. Supp. F.F. No. 8.

Corning to furnish transportation to its female employees.[18]

In July of 1965, the Pennsylvania state regulations were amended to permit employers to employ women at night if the individual workers had regular private transportation.[19]

The Pennsylvania district court found that, beginning October 16, 1966, Corning employed women on the steady night shift jobs, on an equal basis with men, and that both men and women who worked the steady night shift have received the same wage rates.[20]

New York state law was amended in 1953 to provide, for the first time, that women over 21 years of age could work after midnight where the State Industrial Commissioner found that satisfactory conditions existed and granted his approval.[21] The New York district court found that similar provisions of state law remained in effect during all subsequent periods pertinent to this dispute.[22] The State Industrial Commissioner's internal regulations established a union-management agreement as a condition precedent to the granting of such approval.[23]

The New York district court found that there was no evidence that the Industrial Commissioner ever granted Corning permission to employ women on the steady night shift prior to June 1, 1966, when by agreement between

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[18] App. (3d Cir.) 183, M.D. Pa. Supp. F.F. Nos. 9-10.

[19] App. (3d Cir.) 185, M.D. Pa. Supp. F.F. No. 17.

[20] App. (3d Cir.) 177, M.D. Pa. F.F. Nos. 10-11.

[21] Law of April 13, 1953, ch. 708, § 172 (1953) N.Y. Laws.

[22] App. (2d Cir.) 152, W.D. N.Y. F.F. New York Labor Law, § 173(3)(a)(1) (McKinney, 1965), effective October 1, 1963, carried forward the effect of the 1953 amendment.

[23] *Cf.* 2 CCH Lab. L. Rep., State Laws ¶ 44,501 at 56,781 (1970) for the 1970 codification of similar regulations.

Corning and the union women again were employed on that shift.[24]

The district courts in New York and Pennsylvania as well as the Second and Third Circuit Courts of Appeal found that, after October 16, 1966 (Pennsylvania case), and June 1, 1966 (New York case), female employees freely availed themselves of the opportunity to work on the higher paying steady night shift jobs.[25]

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[24] App. (2d Cir.) 152, W.D. N.Y. F.F. The Second Circuit noted that there was no evidence that Corning had sought such permission. App. (2d Cir.) 199. However, such application was a futile act under the applicable regulations (which required union approval) and also futile as a practical matter without union agreement to a changed seniority system.

[25] App. (2d Cir.) 154, W.D. N.Y. F.F.; App. (3d Cir.) 190-91, M.D. Pa. Supp. F.F. Nos. 48-52. At the Wellsboro, Pennsylvania, plant several women with no seniority were hired directly into steady night shift inspection jobs as early as March, 1967. App. (3d Cir.) 191, M.D. Pa. Supp. F.F. No. 49. Any person then employed could have claimed these jobs at that time. App. (3d Cir.) 191, M.D. Pa. Supp. F.F. No. 52. Women filled 276 of 395 openings on the steady night shift jobs prior to June, 1970. App. (3d Cir.) 50. There were 45 inspector jobs on the steady night shift. App. (3d Cir.) 32, 36, 38. Thus, each job became available approximately eight times during the four-year period following October 16, 1966.

At the Corning, New York, plants very junior employees claimed steady night shift inspection jobs. For example, an employee having only one month of service took such a job on June 5, 1966. App. (2d Cir.) 22. Thus, under the plantwide seniority system, any employee having more than one month of service could have taken that job on that date. App. (2d Cir.) 22, 23. The record shows that during the two-year period following June 1, 1966, women took 152 of 278 openings on the various steady night shift jobs involved in this case. Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253. The New York district court found that during 1969 and 1970, 126 women and 101 men accepted steady night shift work. App. (2d Cir.) 185, n.7, W.D. N.Y. F.F. The turnover in these jobs was rapid. On June 1, 1966, there were a total of 101 steady night shift inspectors. App. (2d Cir.) 52, Plaintiff's Exhibit No. 6, introduced I Tr. 24, admitted II Tr. 266. Thus, each job became available approximately three times during the following two years.

Thus, subsequent to June 1 and October 16, 1966, both men and women employed at the Corning and Wellsboro plants, respectively, worked on the steady night shift and received the higher steady night shift wage rate. As a result of these developments, all wage increases paid for jobs at the Wellsboro, Pennsylvania, and Corning, New York, plants were received by men and women alike, regardless of shift worked.[26]

In January, 1969, at the Corning, New York, and Wellsboro, Pennsylvania, plants newly negotiated labor agreements became effective, each of which included a job evaluation plan (hereinafter called the "CGW Plan").[27] The respective job evaluation agreements, and the accompanying rate agreements, established "job evaluated" wage rates for all of the production and maintenance jobs in the Wellsboro and Corning, New York, plants including the jobs involved in these cases.

The New York district court found that the disputed jobs had been rated, along with all other jobs in the Corning, New York, plants, in a "fair, non-discriminatory manner not based on sex."[28]

The "job evaluated" rates of the disputed jobs were higher than the highest rate paid for such jobs on either the day shifts or steady night shifts prior to the effective date of the January, 1969, collective bargaining agreements.[29]

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[26] App. (2d Cir.) 154, W.D. N.Y. F.F.; App. (3d Cir.) 177, M.D. Pa. F.F. Nos. 11-12.

[27] App. (2d Cir.) 182, W.D. N.Y. F.F.; App. (3d Cir.) 189, M.D. Pa. Supp. F.F. No. 38.

[28] App. (2d Cir.) 183, W.D. N.Y. F.F.

[29] App. (2d Cir.) 183 n.4, W.D. N.Y. F.F.; App. (3d Cir.) 55, Stip. of Facts No. 112 states that "[t]he rates on both the steady night shift and the day shifts, subsequent to the agreement of January 10, 1969, are higher than the highest rate paid for work on either shift prior to the agreement of January 10, 1969."

The "job evaluated" wage rates were (and are) paid to employees, on the jobs involved in this case, who had been employed subsequent to January 20, 1969, regardless of the shift on which they are employed. Neither the New York district court nor the Second Circuit Court of Appeals found that these wage payments to persons employed subsequent to January 20, 1969, violated the act.[30]

The January, 1969, labor agreements also provided that all employees, regardless of sex, who had been employed prior to January 20, 1969, should be entitled to a "red circle" rate, which was higher than the fair, non-discriminatory "job evaluated" rate, when employed on the steady night shift inspection jobs.[31] These persons were paid the "job evaluated" rate when employed on the day shift inspection jobs.[32]

The Second Circuit concluded that had Corning and the union agreed to pay only the "job evaluated" rates there could have been "no substantial claim" of a continued violation of the Act, however, that court adopted the view that the provision for payment of a higher "red circle" rate to all persons who accepted work on steady night shift inspection jobs who had been employed prior to January 20, 1969, prevented compliance with the Act.[33]

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[30] App. (2d Cir.) 193, W.D. N.Y. Judgment ¶ 4(a).

[31] App. (2d Cir.) 183, W.D. N.Y. F.F.; App. (3d Cir.) 192, M.D. Pa. Supp. F.F. Nos. 53-56.

[32] App. (2d Cir.) 183, W.D. N.Y. F.F.

[33] App. (2d Cir.) 200, 211-12.

IV. The decisions of the courts below on the issues presented for review

The Second Circuit Court of Appeals held that, although the issue was not "free from doubt,"[34] the legislative history of the Act indicated that Congress intended that steady night work and day work be recognized as similar "working conditions" under the Act.[35] Therefore, the court concluded that steady night shift work constituted a "factor other than sex" upon which a difference in wage rates could be based. The court held that Corning failed to carry its burden of proof, as a matter of affirmative defense, that the wage payments were based upon this factor.

The Second Circuit concluded that Corning's opening of the night jobs to women in 1966 failed to cure the violation because the court adopted the view that the legislative history indicated that the proviso in the Act which prohibits a reduction of wage rates in order to comply with the Act, really means compliance cannot be achieved unless wage rates are increased.[36]

Finally, the Second Circuit ruled that the introduction of the job evaluation plan in January, 1969, accompanied by "job evaluated" wage rates for the disputed jobs failed to achieve compliance with the Act with respect to persons employed prior to January 20, 1969, even though all wage rates had been increased, because Corning agreed to pay all such persons an even higher "red circle" rate for work on the steady night shift.[37] Although the Second Circuit

[34] App. (2d Cir.) 201.

[35] App. (2d Cir.) 203.

[36] App. (2d Cir.) 210.

[37] App. (2d Cir.) 211.

noted that had Corning agreed to pay no more than the "job evaluated" rate there clearly would have been no continued violation, it ruled that the "red circle" rate perpetuated the violation.[38]

In sharp contrast, the District Court for the Middle District of Pennsylvania, which issued its decision after the decision of the New York district court, concluded that working on a steady night shift, as compared with day work "is a condition of employment which can affect an employee's work more than disagreeable surroundings or exposure to hazard. It is a condition under which most people would prefer not to work."[39] The court concluded that "a given job performed at night and at day is not performed under similar working conditions even though all other conditions are identical. Working at night is so significant a factor that the totality of the working conditions here were dissimilar; they were not 'very much alike' or 'alike in substance or essentials.' Hence, Plaintiff has failed to prove a violation of 29 U.S.C. Section 206(d)(1)." [Footnotes omitted.][40]

The Second Circuit's decision had been issued prior to the argument and decision on the Secretary's appeal of the decision of the Pennsylvania district court to the Third Circuit.

The Third Circuit closely examined the Second Circuit's reading of the legislative history as to the meaning of the phrase "similar working conditions" as used in the Act, and flatly rejected that court's reading as erroneous. It concluded that the legislative history clearly supported the

[38] App. (2d Cir.) 212.

[39] App. (3d Cir.) 180.

[40] App. (3d Cir.) 180.

view that work on a steady night shift was not under a similar working condition within the meaning of the Equal Pay Act and, on that basis, affirmed the decision of the Pennsylvania district court.[41]

Neither the Pennsylvania district court nor the Third Circuit reached other issues in that case. However, it should be noted that the Pennsylvania district court issued numerous supplemental fact findings that there were substantial differences in "effort" and "responsibility" comparing the steady night shift jobs with the day shift jobs at the Wellsboro, Pennsylvania, plant. This issue was not involved in the Second Circuit case and was not dealt with by the Third Circuit in view of its agreement with Corning on the threshold issue.

Summary of Argument

The Third Circuit Court of Appeals correctly determined, in regard to Question I of the Questions Presented, that work on a steady night shift is not performed under a similar working condition to day work within the meaning of the Equal Pay Act. The Second Circuit's opposite conclusion is squarely contrary to the clear, unambiguous and carefully prepared statement of the intent of Congress, as to the explicit meaning of the term "working conditions," which was read into the Congressional Record by Representative Goodell. Goodell had authored the bill which ultimately became law, was its principal supporter in the House, and ultimately was selected to state the intent of Congress for the Record and to read the Report of the Committee on Education and Labor concerning the bill into the Congressional Record.

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[41] App. (3d Cir.) 207.

The Second Circuit chose to disregard Goodell's statement of Congressional intent on the basis of that court's misinterpretation of the Report of the Committee on Education and Labor, which Goodell also read into the Congressional Record. The Third Circuit's analysis of the critical passage of the Report shows that the Report is internally inconsistent when interpreted as suggested by the Second Circuit and also inconsistent with Goodell's statements of Congressional intent. On the other hand, the Report is internally harmonious and is harmonious with Goodell's statements as the Report is interpreted by the Third Circuit.

Moreover, the Third Circuit's interpretation is supported by authorities in medicine, sociology, labor arbitrators, War Labor Board decisions, court decisions, and the common sense understanding of all men that working steadily at night is not a similar working condition to day work. The Second Circuit's decision is contrary to all of these authorities and to common sense.

For these reasons the decision of the Third Circuit in case No. 73-695 should be affirmed and that of the Second Circuit reversed in case No. 73-29 and judgment entered for Corning.

The remaining two Questions Presented arise out of the failure of the Second Circuit to properly apply the Equal Pay Act in determining whether, assuming a violation existed, Corning subsequently complied with the Act. The Third Circuit did not reach these questions, having decided that no violation existed.

The Second Circuit erred, in regard to Question II of the Questions Presented, by concluding that Corning's prior violation was not cured on June 1, 1966, when it

opened all jobs on the steady night shift to women, fully integrated the jobs without reducing the wage rate of any employee, and paid women the higher steady night shift wage rate.

The Second Circuit's error is plain. The court had held that work on a steady night shift would support the payment of a higher wage rate than that paid for day work, as a matter of affirmative defense, on the basis of a "factor other than sex"—but had concluded that Corning had failed to carry its burden of proof as to this factor.

On June 1, 1966, Corning removed any possibility that sex discrimination affected the entitlement of employees to receive the higher steady night shift wage rate by opening the night shift jobs to women. Within three weeks after June 1, 1966, *every* woman working on a day shift inspection job had the opportunity to work on the higher rated steady night shift counterpart to the day job on which she worked. Employees having less seniority than any of these women accepted steady night shift inspection jobs in mid-June, 1966.

Thus, the Second Circuit adopted the only basis which could conceivably remain, under the language of the Act, as support for the conclusion that Corning violated the Act after June 1, 1966. The court concluded, erroneously, that the "reduction proviso" of the Act which provides that an employer shall not "reduce the wage rate of any employee" in order to comply with the Act really means that the lower rated jobs (here the day jobs) must be *increased* to the rate of the higher rated jobs (here the steady night shift jobs).

The Second Circuit, through resort to legislative history, held that the words "shall not . . . reduce the wage rate of

any employee" as used in the Act really mean that the employer must increase the rates of all employees on the lower rated jobs. The court erred by using legislative history to change the clear meaning of the words of the statute. *United States v. Oregon*, 366 U.S. 643, 648 (1961). The words "shall not . . . reduce" are not ambiguous and were not determined to be ambiguous by the court. Moreover, the determination that those words really mean "shall increase" is not even a credible definition of the words.

The Second Circuit also erred in its reading of the legislative history which it used to create its definition of the phrase "shall not . . . reduce." Considered in its entirety the legislative history favors Corning's view that Congress intended to write the Act as it was written—that is—to require as conditions of compliance that: (1) the employer not discriminate on the basis of sex in the payment of wages and (2) no employee's wage rate be reduced to achieve that status of non-discrimination.

Corning fully complied with both of those requirements. Therefore, we request that the decision of the Second Circuit be reversed in regard to Question II and that this Court determine that Corning has been in compliance with the Act since June 1, 1966.

The Second Circuit erred, in regard to Question III of the Questions Presented, by concluding that a violation of the Act persisted after January 20, 1969, the effective date of Corning's 1969 labor agreement. This agreement, which included a new job evaluation plan, established a single "job evaluated" rate for each of the disputed jobs which was the same for all three shifts. This "job evaluated" rate was higher than the night shift rate which had been in effect prior to the 1969 agreement as well as higher than

the night rate in effect on June 1, 1966, when the night inspection jobs were opened to women. The Second Circuit ruled that the new "job evaluated" rate was a fair and nondiscriminatory rate which would have, standing alone, terminated any violation of the Act. Implicit in this ruling is a determination by the Second Circuit that the "job evaluated" day rate removed any and all effects of discrimination in the payment of wages to the day shift.

Corning and the union agreed, as part of the installation of the new labor agreement and job evaluation plan, that any person (regardless of sex) who worked the night shift inspection job and who had been employed in any job (not only inspection jobs) prior to the effective date of the agreement (January 20, 1969) would receive a "red circle" rate higher than the "job evaluated" rate. The Second Circuit held that the "red circle" perpetuated discrimination and violated the Act.

The Second Circuit seems to have focused erroneously on the wage differential between steady night work and day work and concluded that as long as a differential exists it must be a violation of the Act since it had been previously found to be a violation.

In adopting this view the court ignored the statute and failed to see that Corning clearly satisfied even the most stringent conceivable requirements of the Act no later than January 20, 1969.

The district court (New York) had found the "job evaluated" rates of the disputed jobs to be fair and non-discriminatory (and not based on sex) in relation to all of the other jobs in the plants and had found that rate to be higher than either the prior steady night shift or day rates. Moreover, the steady night shift jobs had long since been

fully integrated and all persons working day shift jobs had many opportunities to take a steady night shift job. The court erred in concluding that Corning violated the Act by agreeing with the union in collective bargaining that all persons employed prior to January 20, 1969, should receive a wage rate which was even higher than the admittedly fair "job evaluated" rate, when working a steady night shift inspection job.

There is no discrimination in the payment of wage rates on the basis of sex. There has been no reduction in wage rates in order to comply with the Act. The "job evaluated" rate is fair and non-discriminatory.

Moreover, the court's conclusion is contrary to the expressed intent of Congress to allow wide latitude to the free process of collective bargaining so long as there is no discrimination on the basis of sex.

The decision of the Second Circuit should be reversed and Corning should be found to have complied with the Act no later than January 20, 1969.

Argument

I. Work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the equal pay provisions of the Fair Labor Standards Act.

The few facts relevant to this issue are not disputed by the parties and are identical in each of the cases pending before this Court: (1) Corning has paid a higher wage rate for work on steady night shift inspection jobs (10:00 p.m.-6:00 a.m.) than for work on those jobs during the day;[42]

[42] App. (2d Cir.) 150, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. F.F. Nos. 6, 7.

(2) the higher steady night shift rate has been paid to all persons who worked those jobs on that shift;[43] (3) prior to June 1, 1966, (New York case) or October 16, 1966, (Pennsylvania case) only men worked on the steady night shift (except during World War II) and only women worked on the day shifts.[44]

The Second and Third Circuit Courts of Appeal agreed that the equal pay provisions of the Fair Labor Standards Act (hereinafter called the "Act" or the "Equal Pay Act") have no application, and that the complaints should be dismissed, unless the jobs being compared require equal skill, effort and responsibility, and are performed under similar working conditions.[45] Both circuit courts agreed that as to these matters the Secretary bears the burden of proof.[46]

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[43] App. (2d Cir.) 150-51, 154, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. Supp. F.F. Nos. 6, 7.

[44] App. (2d Cir.) 150, 151, W.D. N.Y. F.F.; App. (3d Cir.) 176, M.D. Pa. Supp. F.F. Nos. 4, 5.

[45] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207. The Equal Pay Act provides, in pertinent part, that:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work *on jobs* the performance of which requires equal skill, effort, and responsibility, and *which are performed under similar working conditions*, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ." [Emphasis supplied.] Equal Pay Act of 1963, 29 U.S.C. § 206 (d)(1).

[46] App. (2d Cir.) 201; App. (3d Cir.) 201.

A. The legislative history clearly supports the Third Circuit's interpretation of the meaning of the Act.

The decisions of each of the circuit courts turned upon their respective interpretations of legislative history indicating the intent of Congress as to whether working steadily at night is a "similar working condition" to day work within the meaning of that phrase in the Equal Pay Act.

The Second Circuit decided that steady night work is a "similar working condition" to day work. The Third Circuit decided that night differs from day.

Common experience as well as all of the competent authorities in the fields of physiology and sociology makes it plain that, as the Third Circuit held, work on a steady night shift is not work under a similar condition as day work. Judge Friendly of the Second Circuit clearly recognized this truth—during oral argument he stated from the bench: "You'd have to pay me twice as much to work at night."

It is plain that the Second Circuit was led to its incorrect conclusion that "night" was not a different working condition[47]—contrary to prevailing scientific opinion as well as to every man's experience and to the ordinary use of the words—because the court misunderstood the legislative history.

We submit that the Second Circuit erred and that the legislative history clearly supports the conclusion of the Third Circuit Court of Appeals, which had the full benefit of the Second Circuit's reasoning at the time of its decision.

Representative Charles Goodell, both circuit courts agreed, was a sponsor of the Equal Pay Act.[48] The record

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[47] The Second Circuit stated in its opinion that the issue was "not free from doubt." App. (2d Cir.) 201.

[48] App. (2d Cir.) 205; App. (3d Cir.) 205.

shows that Congressman Goodell authored the bill which eventually became the Equal Pay Act[49] and also played a dominant role in the explanation of the meaning of the bill on the House floor.[50]

Mr. Goodell was the spokesman for the Committee on Education and Labor, which reported the bill. He was charged with the responsibility of setting forth the legislative history of the bill and then reading the Committee Report on the bill into the Congressional Record prior to the House vote.

Mr. Goodell began the process of introducing the Committee Report by noting:

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[49] Early in the First Session of the 88th Congress, Congresswoman Green proposed a bill, H.R. 3861, regarding sex discrimination in the payment of wages. 109 CONG. REC. 2482 (House, Feb. 18, 1963). Her bill was known as the "administration bill." H.R. REP. No. 309, 88th Cong., 1st Sess., Addendum B, B-6 (Addenda are hereinafter cited as "Add. ___"). H.R. 3861 is printed at Add. C, C-1. The House Committee on Education and Labor rejected the approach taken by H.R. 3861. H.R. REP. No. 309, Add. B, B-6, 7; 109 CONG. REC. 9195 (House, May 23, 1963), Add. B, B-22, 23. On March 25, 1963, Congressman Goodell introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. *Id.*; H.R. 5605 is printed at Add. D, D-1. Virtually all of the proposals of the Goodell bill were accepted by the Committee and embodied in a new form of the bill, H.R. 6060. H.R. REP. No. 309, Add. B, B-6, 7. Congressman Goodell's bill first introduced the requirement that "equal effort, responsibility, and similar conditions" exist before the Act is applicable. *Id.*; 109 CONG. REC. 9208 (House, May 23, 1963). Although Congresswoman Green was the one who had the honor of introducing H.R. 6060, H.R. 6060 was essentially the same bill as introduced by Goodell as H.R. 5605. 109 CONG. REC. 9193 (House, May 23, 1963), Add. B, B-21. It was H.R. 6060 which became the Equal Pay Act. The text of the bill passed by the Senate (S. 1409, printed at Add. E, E-1) was amended in its entirety by insertion of the language of H.R. 6060 and then passed by the House. 109 CONG. REC. 9217-18 (House, May 23, 1963).

[50] 109 CONG. REC. 9197, 9208-9 (House, May 23, 1963), Add. B, B-26, 33-36.

"I introduced the first bill that would put this under the Fair Labor Standards Act in either body of Congress, and the first bill using the terms 'effort,' 'responsibility,' and 'working conditions' in defining equal work. Since this bill before us largely adopts my own personal views, and most of the words in this bill derive from my proposal, I would like to make clear the legislative history, and I think the chairman of the subcommittee agrees on these points:

"No. 1. Skill includes a myriad of factors. It is not limited to just a few. It includes training, experience, education, the qualities of the person himself, and a good many other factors that are too numerous to put into the bill specifically, so we used a generality in referring to them. The same is true of effort, the same is true of responsibility, and the same is true of similar working conditions." 109 CONG. REC. 9208 (House, May 23, 1963).

Representative Goodell then discussed various other matters before reading into the record detailed statements of legislative intent which were quite apparently prepared with great care and, from their context, it is certain that Goodell was speaking as representative of the Committee. These statements of legislative intent were read into the Congressional Record immediately before Goodell read the Committee Report into the record.

Congressman Goodell stated:

"Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

• • •

"Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity

worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing, as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*" [Emphasis supplied.] 109 CONG. REC. 9209 (House, May 23, 1963), Add. B, B-34, 35.

The Third Circuit noted that this statement, made by the author and sponsor of the bill immediately prior to reading the Committee Report into the Congressional Record and proclaimed as an example and general guideline as to the intent of Congress, is the *only statement* on the point in dispute which is "*clear* and *unambiguous.*"[51] [Emphasis supplied.]

Goodell stated plainly that a difference in hours of work or shift was intended by Congress to constitute a difference in working conditions within the meaning of the Equal Pay Act.

The Second Circuit felt that Goodell's clear statement of Congressional intent was outweighed by the following statements in the Committee Report (which Goodell also read into the Record):

> "Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded." 109 CONG. REC. 9210 (House, May 23, 1963), Add. B, B-40.

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[51] App. (3d Cir.) 204-05.

The Third Circuit's analysis of the Second Circuit's error in relying upon the above-quoted statements cannot be improved upon:

> "In quoting this statement, the Second Circuit opinion interlineated the words 'differentials based on any other factor other than sex' in brackets after the words the 'broad general exclusion' in the next to the last sentence in the quoted paragraph, thus revealing its belief that a 'factor other than sex' is the 'broad general exclusion' referred to by the Committee.[19] Although, in view of the context and language of the quoted statement, Chief Judge Friendly's interpretation would appear to be correct, we do not conclude, as the Second Circuit apparently did, that the last sentence in the quoted paragraph, beginning with the word 'Thus,' should therefore be construed as listing only examples of a 'factor other than sex.'
>
> "The specific examples that the Committee Report, in the last sentence, states would be excluded are 'shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability. . . .'[20] *As a group*, these examples cannot be interpreted as 'factor[s] other than sex' for the simple reason that some of them clearly represent requisites to the applicability of the Act: skill, effort, responsibility, and working conditions. Thus, 'lifting or moving heavy objects' is, beyond dispute, an example of 'effort,' and 'experience, training, or ability' are examples of 'skill.' And 'effort' and 'skill,' along with 'working conditions' and 'responsibility' are specifically listed requisites that would make the Equal Pay Act altogether inapplicable, and which cannot, therefore, logically be classified as 'factor[s] other than sex'[21] to be considered as matters of defense.

"[19] 474 F.2d at 232: '"As it is impossible to list each and every exception, the broad general exclusion ['differentials based on any other factor other than sex'] has been also included."'

"[20] 109 Cong. Rec. 9210 (1963).

"[21] 29 U.S.C. § 206(d)(1).

"Of course, our interpretation of the Committee Report—that the examples set forth are not *all* 'factor[s] other than sex'—does not by itself suggest the converse—that they are *all* examples of 'skill, effort, and responsibility, and . . . working conditions.' Thus, the listing made by the Committee Report may in fact be not simply a set of black-or-white illustrations taken exclusively from the Act's requisites (i.e., effort, skill, responsibility, and working conditions) or solely from one of its defenses ('factor[s] other than sex'), but rather a chiaroscuro picture painted with brushes dabbed in both groups. The question, therefore, remains whether time of day worked is a 'working condition,' or a 'factor other than sex.'

"The only clear and unambiguous evidence concerning this point is the following statement made during the course of an explanation of the Act by Congressman Goodell, who sponsored the bill and participated in redrafting it:

> "'Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. *Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.*' (Emphasis supplied)[22]

"Because of its interpretation of the Committee Report, the Second Circuit discounted this explanation by Congressman Goodell,[23] although it was made by the bill's sponsor immediately before reading the Committee Report into the Congressional Record. In addition, it was proclaimed by Congressman Goodell as an

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"[22] 109 Cong. Rec. 9209 (1963).

"[23] 474 F.2d at 232.

example and guideline as to the intent of Congress. Whatever may be the merits of minimizing the view of a bill's sponsor when a Committee Report is thought to be clear and contrary to the statements of individual legislators,[24] this Court's interpretation of the Committee Report suggests no basic conflict between the report and Congressman Goodell's statements. A comparison of the two demonstrates this:

"Committee Report:	Congressman Goodell:
'Thus, among other things, shift differentials, restrictions on or differences based on time of day worked . . . would also be excluded . . .'	'Ninth . . . Finally . . . hours of work, differences in shift all would logically fall within the *working condition* factor.' (emphasis supplied)
'Thus, among other things . . . lifting or moving heavy objects . . . would also be excluded.'	'Ninth . . . The usual factors of push, pull, lift, and carry come under *effort* . . .' (emphasis supplied)
'Thus, among other things . . . differences based on experience, training or ability would also be excluded.'	'Ninth . . . such things as experience, ability, and training may be considered under the broad heading of skill. . . .' (emphasis supplied)

"Under these circumstances, where the ambiguous Committee Report and the statements by the sponsor of the legislation may reasonably be read not as conflicting but as complimentary and harmonious, giving emphasis to Congressman Goodell's explanation would not appear inappropriate. Indeed, a sponsor's views

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"[24] *See* Zuber v. Allen, 396 U.S. 168, 186 (1969); United States v. O'Brien, 391 U.S. 367, 385 (1967), involving situations of *conflict* between Committee Reports and statements of legislators. *Cf.* American Airlines, Inc. v. C.A.B., 365 F.2d 939, 949 (D.C. Cir. 1966).

are entitled to great weight in any event.[25] As this Court stated in Gartner v. Soloner:[26]

> "'In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102.'
>
> "We conclude, then, that time of day worked is a 'working condition' within the meaning of the Equal Pay Act and not merely a 'factor other than sex' to be used by an employer as a matter of defense.[27]

[25] *See, e.g.*, National Woodwork Mfgs. Assn. v. N.L.R.B., 386 U.S. 612 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394 (1951); Pan American World Airways, Inc. v. C.A.B., 380 F.2d 770, 782 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). It should be noted that this Court has already given weight to Representative Goodell's views concerning the Equal Pay Act. *See* Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 595 (3d Cir. 1973).

[26] 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

[27] The Wage and Hour Administrator's regulations agree with the Second Circuit's treatment of time of day worked as a 'factor other than sex' and not a 'working condition,' 29 C.F.R. §§ 800.100, 800.145. Although such administrative interpretations are entitled to some deference, we cannot pay such homage to them so as to blind ourselves to the meaning of the legislative history as we read it."

App. (3d Cir.) 203-07.

The Second Circuit also placed reliance upon the fact that a Corning representative had testified before the House Subcommittee about Corning's Job Evaluation Plan and had said nothing about steady night work as a different working condition than day work.[52]

This reliance would not appear well founded in view of the intent of Congress as found by the Third Circuit.

[52] App. (2d Cir.) 203.

These witnesses did not express a view on the question in dispute. Most important, they were not congressmen and the absence of comment on their part cannot be construed to outweigh the clearly expressed intent of Congress as spelled out by the author and sponsor of the Act and by the Report of the Committee on Education and Labor to the House.[53]

The Secretary, in its petition for a writ of certiorari in the Pennsylvania case (p. 14, n. 8), stated that Representative Goodell was not a sponsor of the bill "as the court below supposed." Our research on this question, set forth *supra*, Brief at 23 n. 49, shows clearly that he authored the bill, was selected by the Committee on Education and Labor to set forth the intent of Congress to the House and also to read the Committee Report into the Congressional Record. Clearly he was the member of Congress working for the passage of the bill who was most intimately familiar with the bill.

In *United States v. United Mine Workers*, 330 U. S. 258 (1947), this Court relied upon the testimony of Representatives Michener and LaGuardia in construing a provision of the Norris-LaGuardia Act. The Court explained why their statements were relied upon:

> "Representatives Michener and LaGuardia were members of the Judiciary Committee which reported and recommended the bill to the House. They were the most active spokesmen for the Committee, both in explaining the bill and advocating its passage. No

[53] The fact that job evaluation plans do not include time of day within "working conditions" merely means that this is an element of working conditions which is so important that unions and companies are reluctant to fix its value in relation to other factors—they want to be able to negotiate the value of this condition in free collective bargaining.

> member of the House who voted for the bill challenged their explanations. . . . We cannot but believe that the House accepted these authoritative representations as to the proper construction of the bill." [Footnotes omitted.] *United States v. United Mine Workers*, *supra*, 330 U.S. 258, 279-80.

Accord, First Nat'l. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 258-61 (1966); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-95 (1951).

The last leg upon which the Second Circuit's interpretation of the term "working conditions" rests is the "deference" [citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)] which it accorded[53a] certain interpretive bulletins which, although they are not explicit, may indicate the Administrator's belief that steady night work and day work are not to be treated as "working conditions" under the Act. The Second Circuit erred in deferring to the Administrator's regulations with respect to this issue; certainly *Skidmore v. Swift*, *supra*, does not support such deference.

Skidmore was a case in which the lower courts had ignored the Administrator's interpretive bulletin setting forth guidelines in an area in which the Administrator had considerable experience and accumulated expertise. This Court held that the lower courts had erred in failing to take into proper account the Administrator's views in an area where he had expertise. This Court also acknowledged, in *Skidmore*, *supra* at 139, that the Administrator's rulings are not arrived at as a result of adversary proceedings; they are not conclusive "even in the cases in

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[53a] App. (2d Cir.) 205. The Second Circuit relied upon the fact that the Wage and Hour Administrator had not listed "night" in his regulations dealing with "working conditions" (29 C.F.R. § 800.132) but had listed "shift differentials" as "factors other than sex" (29 C.F.R. § 800.145).

which they directly deal, much less those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do." *Skidmore v. Swift & Co., supra*, 323 U.S. 134, 139.[54]

In the instant case the Administrator has not issued an interpretive bulletin directly addressed to the question of whether work on a steady night shift is under a different working condition than day work.

Even more significant, however, is the fact that a determination of what Congress intended by the phrase "similar working conditions" in the Equal Pay Act is not a matter as to which the Administrator has expertise or as to which interpretive bulletins are entitled to any deference by the courts. This is particularly so where, as here, "application of the guideline [by analogy] would be inconsistent with an obvious congressional intent not to reach the employment practice in question." *Espinoza v. Farah Mfg. Co.*, 42 U.S.L.W. 4014, 4016-17 (U.S. Nov. 19, 1973).

B. Authorities in medicine, sociology, labor, and management have recognized that working regularly at night has different physiological effects upon workers than day work.

The decision of the Third Circuit is in accord with the authorities in medicine, sociology, and industry.

Those who are familiar with working on the night shift understand that it is a different working condition from day work.

As one analyst of production problems has noted:

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[54] Congressman Goodell reaffirmed Congressional intent that the Administrator not have interpretive power regarding the Equal Pay Act. 109 CONG. REC. 9208-09 (House, May 23, 1963), Add. B, B-33, 34.

"[P]roblems result from the dislocation of everyday routines that occurs when the working day is actually a night. Inability to sleep well during the day; digestives upsets caused by odd mealtimes; exclusion from family evenings at home; having to work when friends are at play; these and other factors may produce irritability, lethargy or even antisocial behavior among employees." Steward C. Mott, *Must Night Shifts Be A Headache?*, SUPERVISORY MANAGEMENT, 20 (Nov. 1968).

The physiological effects of night work are attributable to the effects which night work has upon the night worker's daily biological rhythms.

In a book published by the United States Department of Health, Education and Welfare, these biological rhythms are described as follows:

"In concert with the turning earth, plants and animals exhibit a very pronounced daily rhythm. . . . This daily rhythm is denoted by the popular term 'circadian.' It means 'about a day,' from the Latin, *circa dies*.

". . . [M]en—indeed, most living organisms show a circadian rhythm of activity and rest. . . . Man, no exception to this daily ebb and flow, may be unaware that his body temperature, blood pressure, and pulse, respiration, blood sugar, hemoglobin levels, and amino acid levels are changing in a circadian rhythm. So, too, do the levels of adrenal hormones in his blood and concentrations of essential biochemicals throughout his nervous system. . . . As a decade of laboratory researches has disclosed, there is a rhythmic fluctuation in the contents of the urine, along with almost every physiological function, from the deposition of fat or sugar in the liver to the rate at which cells are dividing.

. . . .

"The corollary of all this circadian change is very dramatic, for a creature's strength and weakness also

vary, depending upon biological time of day." U. S. PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION & WELFARE, BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE 1 (1970).

Medical studies indicate that when a worker shifts from day work to night work, even for those whose biological rhythms can adapt to night work, it usually takes at least five or six days before that adjustment is achieved.[55] Some studies have suggested that as high as 38 percent of night workers may never adapt.[56]

However, even for those night shift workers who can adapt to night work after six days of night duty, an individual's adoption, on weekends, of a schedule of recreation by day and sleeping by night will probably cause a biological reversion to the normal daylight schedule within one or two days.[57] Of course, six more days are then required to biologically adapt to night work, assuming that the worker is one who can biologically adapt.

Thus, most night workers are usually in a physical state where their biological life rhythms are in a state of disruption.

As the Department of Health, Education and Welfare's publication BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE states:

"Many of the early studies of accidents, ill health, and performance errors among night workers were

[55] K. F. MURRELL, HUMAN PERFORMANCE IN INDUSTRY 431 (1965); W. P. Colquhoun, M. J. F. Blake, & R. S. Edwards, Medical Research Council, Applied Psychology Research Unit, Cambridge England, *Experimental Studies of Shift-Work II: Stabilized 8-hour Shift Systems,* 11 ERGONOMICS 527, 544-45 (1968) [hereinafter cited as COLQUHOUN].

[56] MURRELL, *supra* note 55, at 431.

[57] *Id.;* COLQUHOUN, *supra* note 55, at 545.

attributed to night work, itself, while the effects really came from the workers' phase shifts on weekends and time off." BIOLOGICAL RHYTHMS IN PSYCHIATRY AND MEDICINE, *supra* at 134.

A report from the British Medical Research Council Group for Research in Industrial Psychology well summarizes the physiological effects of night work as follows:

> "The interference with sleep and digestion is perhaps the most obvious and expected effect of night work and shift changes. The human body is a complicated and balanced mechanism which, when properly nourished and rested, continues to function in a smooth and effortless manner. Any marked deviation from the normal mode of life, such as the reversal of eating and sleeping habits, will naturally disturb the physiological rhythms and impose additional strains on the body mechanisms. Although the human machine is very adaptable there are limits to what it can bear and it is probably not surprising that some men were sorely tested by the change from day to night work." S. Wyatt & R. Marriott, *Night Work and Shift Changes*, Medical Research Council Group, Research in Industrial Psychology. 10 BRITISH JOURNAL OF INDUSTRIAL MEDICINE 164, 171 (1953).

As the same report from members of the British Medical Research Council notes, there are sociological disadvantages to working on the night shift:

> "[P]hysiological disturbances are, however, not the only adverse effects of night work; they are sometimes equalled or exceeded by psychological stresses and strains caused by the disruption of social and family life. Most men and women have fairly fixed habits and dislike any change in their daily or weekly routine. Evening and week-end interests and activities are often the only high lights in a rather colorless existence and anything that interferes with these pleasures is usually strongly resented. Even more serious in their effects are the mental and emotional conflicts caused by the dislocation of normal married

> life. Several men referred to this problem and their comments varied from the comparatively mild opinion that 'a week is quite long enough for the wife to be left alone at night' to admissions of strained or broken marital relations which were accentuated, if not caused, by night work." S. Wyatt & R. Marriott, *supra* at 171.

This Court, in interpreting the minimum wage provisions of the Fair Labor Standards Act, has viewed night as a condition for which payments may properly be made by employers. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1948).[58] This Court stated:

> "Where an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor . . . ." 334 U.S. 446, 468-69.

The National War Labor Board recognized night as a different working condition than day for which an employer could properly compensate night workers in excess of day workers.

In *Firestone Tire & Rubber Co.*, 9 War Labor Reports (WLR) 726, 731-32 (1943), the following appears:

> "*Discussion—The undersirable conditions attached to night work* are present whether the work is done in steel, chemical, or rubber manufactories. Employees who forsake normal social life and endure the irregularities of sleeping and eating at unnatural hours.

[58] In that case this Court was concerned with whether increased pay rates for work at hours labeled by the labor agreement as "overtime rates" for work done outside certain regular working hours were, within the meaning of the Fair Labor Standards Act, actually "overtime rates" or whether they were really rates paid for working undesirable hours. 334 U.S. 446 (1948). This was relevant to a determination of whether the higher rates were to be included in the average base rate upon which hours in excess of 40 per week were to be paid.

should receive a special compensation to balance these disadvantages." [Emphasis supplied.][59]

Perhaps the best sources of industrial practices or labor relations "law" are the reported decisions of labor arbitrators. *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581-82 (1960).

The following are quotations from a few of the many arbitration decisions which have recognized night as a different working condition:

> "The graveyard shift is generally regarded as the least desirable, and should therefore, it seems to me, receive added compensation." *Hotel Employers' Ass'n*, 18 LA 174, 183 (1952).[60]

> "It is clear that the employee who works on the third shift must necessarily live an abnormal life. For this, it is now fairly general industry practice to grant additional compensation." *Dairyland Power Cooperative*, 14 LA 737, 743 (1950).

> "Premium pay for night shift work has become a rather common method of compensating workmen for undesirable social handicaps. . . ." *Accurate Machine Tool, Inc.*, 10 LA 365, 366 (1948).[61]

Scientists and medical researchers are really just beginning to document the dramatic differences between night and day work of which night workers have complained for many years. At least one research project has produced such serious worries about the effect of night work that it concluded:

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[59] *Accord, Western Union Telegraph Co.*, 6 WLR 133, 148-49 (1943); *Frank Foundries Corp.*, 3 WLR 223, 226-28 (1942).

[60] References "LA" are to "Labor Arbitration Reports" published by the Bureau of National Affairs, and now consisting of some 60 volumes, published at the rate of about 3 or 4 a year.

[61] *Accord, Link-Belt Speeder Corp.*, 2 LA 338, 341 (1945).

> "The only real solution to the problem is, of course, the abolition of night work except in times of emergency and in certain continuous processes. There is not the least doubt that night work is unpopular and, in the long run, is detrimental to health, efficiency, and the enjoyment of life. In every group of workers, some break down in health after a few weeks, months, or years of night work. These are the obvious casualties but it is reasonable to suppose that almost all workers are adversely affected in some degree and brought nearer to the point when the effects can no longer be ignored." S. Wyatt & R. Marriott, *Night Work and Shift Changes*, Medical Research Council Group, Research in Industrial Psychology, 10 BRITISH JOURNAL OF INDUSTRIAL MEDICINE 164, 171 (1953).

All of the above authorities in labor, management, the judiciary, science, medicine, and sociology have recognized the great extent to which a night worker works under a different working condition than the day workers.

For the reasons advanced above, we respectfully request that the decision of the Third Circuit Court of Appeals be affirmed and that the decision of the Second Circuit Court of Appeals be reversed.

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the union making the steady night shift inspection jobs available to women without reducing any employee's wage rate.

On June 1, 1966, the night shift inspection jobs at the Corning, New York, plants were opened to women.[62] After June 1, 1966, both men and women received the day inspection rate when they worked during the day and both men and women received the night shift inspection rate when

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[62] Brief, *supra* at 9-11.

they worked during the night.[63] There was a high turnover among employees working on these jobs. In the first week the jobs were opened, women began transferring to the night shift.[63a] By June 20, 1966, every inspector who had been working on the day shift when the jobs were opened had the opportunity to transfer to the counter-part inspection job on the night shift.[63b]

In the two-year period following June 1, 1966, women took 152 of 278 openings on the 101 night shift inspector jobs involved in this case.[63c] Thus, each job became available almost three times during the two years following June 1, 1966.

After June 1, 1966, there were no distinctions in the wage rate paid to either sex.[64]

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[63] Brief, *supra* at 9-11.

[63a] Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253.

[63b] In the first week of June 1966, D. E. Hellman took a job as General TV inspector on the night shift. Plaintiff's Exhibit No. 12 (computer printout, not printed in Appendix), introduced I Tr. 26, admitted II Tr. 253. Hellman had less seniority than anyone who had been working as a General TV inspector in the period when the night shift was opened to women at the start of June, 1966. *Id.* In the third week of June, 1966, W. F. Sherman took a job as a Class C inspector on the night shift. *Id.* Sherman had less seniority than anyone who had been working as a Class C inspector on the day shift in the period when the night shift was opened to women at the start of June, 1966. In the third week of June, 1966, W. D. Lovell took a job as a Class B inspector on the night shift. *Id.* Lovell had less seniority than anyone who had been working as a Class B inspector on the day shift in the period when the night shift was opened to women at the start of June 1966. *Id.* Thus, under the plantwide seniority system in effect, any employee senior to the named individuals (which included all of the day shift inspectors) could have taken these night shift inspection jobs. App. (2d Cir.) 22, 23.

[63c] Brief, *supra* at 10 n.25.

[64] Brief, *supra* at 9-11.

The Second Circuit held[65] that a violation continued, in spite of the facts outlined above, on the ground—and this is the only ground which could conceivably support such a conclusion—that Corning had violated the "reduction proviso" of the Act, which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

There was neither proof in the record nor any finding by any of the courts below that any employee's wage rate had been reduced.

However, the Second Circuit decided that the phrase "shall not . . . reduce" found in the "reduction proviso" should be interpreted to mean that the employer must *increase* the wage rate of the lower rated job.

The Second Circuit indicated with somewhat less than complete certainty that Corning was incorrect in arguing that any prior violation was cured by the opening of the night shift jobs to women. The Court of Appeals stated:

> "Although this argument [by Corning] seems persuasive at first blush, it must be rejected." App. (2d Cir.) 210.

The Second Circuit felt compelled by certain legislative history from the House of Representatives regarding the "reduction proviso" to hold that the lower rated job must always be increased to the higher rate.[66] This was improper.

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[65] App. (2d Cir.) 210.

[66] The Second Circuit referred [App. (2d Cir.) 210-11] to statements of Representative Griffin in *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 88th Cong., 1st Sess. 65 (1963) as well as to H.R. Rep. No. 309, 88th Cong., 1st Sess. 8 (1963).

It is an established rule of judicial construction that legislative history should not be used to change the clear meaning of the words of the statute. *United States v. Oregon*, 366 U.S. 643, 648 (1961).[67] There was no determination by the court of appeals that there was any ambiguity in the words "shall not . . . reduce." Absent any such ambiguity in the words of the statute, there should be no resort to legislative history.

Further, assuming that resort to legislative history is justified, the legislative history relied upon by the Second Circuit is not sufficiently conclusive to justify that court's revision of the statute. On balance the legislative history favors Corning.

The Second Circuit relied upon a colloquy between Representative Griffin, Secretary of Labor Wirtz, and Representative Thompson.[68] In that colloquy Representative Griffin suggested that in some situations the job rate might equitably be reduced to a level which represented an accommodation between the old "male rate" and the old "female rate." The discussion was as follows:

> "MR. GRIFFIN. Mr. Secretary, I think this sort of brings up the question of whether or not the sole purpose of this legislation is to eliminate discrimination on the basis of sex, or whether this legislation has another purpose; namely, to raise wage levels in this country. If the only way violations of the law can be remedied is to raise wage levels, it is going to have that effect; is it not?
>
> "SECRETARY WIRTZ. Yes.
>
> "I did not mean to interrupt. Is that your question?
>
> "MR. GRIFFIN. Yes.

[67] *United States v. Oregon*, 366 U.S. 643 (1961), involved the interpretation of a federal statute dealing with the disposition of personal property of veterans who have died in a veterans' hospital, without will or legal heirs.

[68] App. (2d Cir.) 210-11.

"SECRETARY WIRTZ. The purpose of it is to eliminate the differentiation and is exclusively that.

"MR. GRIFFIN. Why, then—I am not suggesting that in every case the man should be fired or that in every case the man's wage should be lowered to the women's wage; however, I am suggesting that there may be situations where it may be necessary in order for a particular employer to stay in business, to have some accommodation between the wages paid to the men and the women. It might be equitable to pay a wage that would be somewhere in between, a wage that all would agree upon. But, as I understand it, the proposed bill would not permit that to happen.

"The only way a violation could be remedied under the bill—and certainly a union is going to insist on it—is for the lower wages to be raised to the higher.

"It seems to me there is a serious problem here that we ought to face.

"SECRETARY WIRTZ. Of course, the questions are put and the answers recognize that this was a matter of a good deal of discussion last year in connection with this legislation, and I am not sure how much I can add to that really very extensive consideration.

"I can only say that again, it would seem to me that this is a matter which will arise more infrequently. My immediate reaction is a little different from the one you have suggested about the treatment which would result in a mutually satisfactory settlement as far as all the parties are concerned.

"I think of a case that has come up under one of the State laws, Congressman Griffin, in which there was a settlement of about that same kind.

"In that case there was an adjustment worked out in a situation apparently about like the one that you have posited here, in which there was an adjustment of both the rates, to bring them into accommodation, and I can only say that with whatever question there may be about the letter of the act, if the situation

presented itself to me as administrator under the act, in which a mutually satisfactory arrangement of that kind had been made, my every disposition would be to accept that mutually satisfactory arrangement.

"MR. GRIFFIN. Of course, whenever we raise questions of this nature it is not unusual for the administrator at the present time to say, 'Well, if this came to me, I would not do such and such,' but we cannot legislate on the basis that you will always be the Secretary of Labor.

"SECRETARY WIRTZ. Completely right, and—

"MR. GRIFFIN. Of course, we expect you will be for a while at least—

"SECRETARY WIRTZ. You shame me, nor could I answer the question fairly in those terms, and I will withdraw that part of the answer, and I would simply say in a general way—well, let's let the matter end there. I appreciate your point.

"MR. GRIFFIN. I have taken more than my allotted time, Mr. Chairman, and I yield the floor.

"MR. THOMPSON. Mr. Secretary, I gather, then, that in response to Mr. Griffin's earlier question that it is not the intention of the Department or of yourself to have this become law in order to raise wages, but rather to establish the principle of equal pay for equal work, and some means by which to enforce it. Is that correct?

"SECRETARY WIRTZ. That is right, Mr. Chairman." *Hearings on H. R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 88th Cong., 1st Sess. 64-65 (1963), Add. A, A-6-8.

The Second Circuit relied upon the above-quoted statements of Representative Griffin.[69] However those statements were made on March 15, 1963, at hearings upon and in reference to H.R. 3861, a bill vastly different from the statute eventually enacted.[70] The language of H.R. 3861

[69] App. (2d Cir.) 210-11.

[70] Add. A, A-1.

explicitly stated that the lower wage rates were required to be raised.[71]

The quoted statements of both Representative Griffin and Secretary Wirtz indicated that both men were dissatisfied with any absolute requirement that the lower rate always be raised to the level of the higher. The bill which eventually passed the House, H.R. 6060, was introduced on May 6, 1963,[72] and no longer contained the language mandating an increase in the lower rate.

H.R. 6060 and the statute as enacted removed the mandate, that the lower rate be increased, which was contained in H.R. 3861. H.R. 6060 and the statute as enacted adopted the course of prohibiting a reduction in the high rated job.[73]

It is true that House Report No. 309 (in regard to H.R. 6060), also relied upon by the Second Circuit,[74] contains a one sentence reference to this matter. It states:

> "The lower wage rate must be increased to the level of the higher." H.R. REP. No. 309, 88th Cong., 1st Sess. 8 (1963), Add. B, B-4.

This sentence is the lone legislative history lending support to the Second Circuit's decision.

This sentence in House Report No. 309 is not sufficient to alter the clear words of the statute. When the Committee came to the task of writing some commentary in House Report No. 309 upon the "reduction proviso," which would be more than a mere repetition of the proviso,

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[71] Add. C, C-5.

[72] 109 CONG. REC. 7848 (House, May 6, 1963).

[73] Add. E, E-3 and 29 U.S.C. § 206(d)(1).

[74] App. (2d Cir.) 211. The Second Circuit used only a "see also" cite to H.R. REP. 309, thus recognizing the inconclusive nature of the report.

the draftsmen may have stated without adequate deliberation what they considered to be the equivalent of that phrase without realizing that the phrases are not equivalent.

It seems probable that the legislators in the House were actually concerned with and attempting to prohibit a reduction in the higher rated job. For example, Representative Thompson in elaborating upon H.R. 6060 and, presumably, upon House Report No. 309 (produced by the subcommittee which he chaired) stated:

> "The lower wage rate must be increased to the higher level *so that there will not be an adverse effect on already established wage patterns.*" [Emphasis supplied.] 109 CONG. REC. 9196 (House, May 23, 1963), Add. B, B-23.

Representative Thompson's statements indicate that he was considering only the alternatives of increasing the lower rate or reducing the higher. Opening the steady night shift jobs to women obviously did not have "an adverse effect on already established wage patterns."

The legislative history in the other legislative body, the Senate, favors Corning. It indicates that the "reduction proviso" was intended, exactly as it was written, to prohibit the reduction in the higher rated job, rather than to mandate an increase in the lower rated job.

Senate Report No. 176, for example, makes clear that the Senate felt that the "reduction proviso" was aimed at establishing that an "individual's present economic status" would not be adversely affected by the enactment of the legislation.[15]

This prohibition against a reduction of the higher rate is precisely what Congress provided in the explicit language of the Act.

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[15] S. REP. No. 176, 88th Cong. 1st Sess. (1963), 109 CONG. REC. 8915 (Senate, May 17, 1963), Add. B, B-20.

Thus, on balance, it appears the legislative history on this matter favors Corning. The original bill, H.R. 3861, mandated an increase in the lower rated job. That requirement was removed subsequent to objections by Representative Griffin at the hearing on H.R. 3861. The Senate Report No. 176 favors Corning. The lone sentence in House Report No. 309 cannot justify revision of the statutory phrase "shall not . . . reduce" to mean "shall increase."

No resort should have been made to legislative history absent a determination by the Second Circuit that (1) the words "shall not . . . reduce" were equivocal on their face[76] and (2) that Corning might have committed some acts falling within some credible definition of "shall not . . . reduce." Not only did the Second Circuit fail to ask whether there was ambiguity in the phrase "shall not . . . reduce," but that court eventually formed a definition of "shall not . . . reduce" that meant "shall increase."

The Second Circuit also relied upon decisions in two other circuits in rationalizing its conclusion.[77] Those decisions should not be read as establishing the rule that the lower rated job must always be increased to the higher rate. In *Hodgson v. Square D Co.*[78] and *Shultz v. American Can Co.—Dixie Products*[79] the Sixth and Eighth Circuits,

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[76] *United States v. Oregon*, 366 U.S. 643, 648 (1961).

[77] App. (2d Cir.) 211. In a third case, to which the Second Circuit made only a comparison citation, *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 226 (7th Cir. 1972), the Seventh Circuit noted that Miller Brewing, through a complex system of transferring employees, "arrived at the same result as if it had initially, after the effective date of the Equal Pay Act, equalized pay in the Analytical Lab by lowering the male employees wages by 70 cents per hour."

[78] 459 F.2d 805, 808 (6th Cir.) *cert. denied*, 409 U.S. 967 (1972). The Eastern District of Kentucky discussed the fact that women had been discouraged from taking the higher rated job. 19 Wage & Hour Cas. 752, 754 (E.D. Ky. 1970).

[79] 424 F.2d 356, 359 (8th Cir. 1970).

respectively, dealt with situations in which the higher rated jobs were formally "opened" to women but the women had not actually been able to transfer to those jobs.[80]

The facts of the instant case were very different from *Square D* and *American Can.*

At Corning the women had immediate and frequent opportunities to transfer to the night shift.[81]

The court of appeals recognized that a considerable number of women transferred into the night jobs.[82]

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[80] If *Square D Co.* and *American Can Co.* are read as mandating in every case, an increase in the lower rate, then Corning respectfully disagrees with those decisions for the reasons set forth herein.

[81] Brief, *supra* at 10 n. 25.

[82] App. (2d Cir.) 200. However, the Second Circuit may have been somewhat confused by certain testimony in the deposition of Earle Lewis, Plaintiff's Exhibit No. 93 [App. (2d Cir.) 133], introduced I Tr. 55, admitted II Tr. 384. Mr. Lewis testified that in 1966 there were 4 female day time inspectors whose transfer requests to go to the night shift were honored. There were 11 female daytime inspectors who had filed transfer requests which were considered "outdated" and discarded by the company. The Second Circuit seems to imply that the 11 requests which were not honored in 1966 were not honored because no vacancies existed on the night shift. App. (2d Cir.) 200 n.6. However, requests are considered outdated because either the employee has moved to another job since making the transfer request or there has been no vacancy within six months of the transfer application. App. (2d Cir.) 138. Due to the high turnover it is probable that most of the 11 female transfer requests which were considered "outdated" were so considered because the applicant had left the job from which the transfer had been requested. In 1967, out of the 61 female inspectors who sought transfers to the night shift, 39 requests were honored and 22 were considered "outdated," again, probably because the applicant had transferred. In 1968, 42 out of the 52 female inspector applicants had their transfer request honored and 10 were considered "outdated." Thus, by the end of 1968 every female inspector who had been working the day shift prior to June 1, 1966, had received numerous opportunities to transfer to the night shift. As early as June 20, 1966, every inspector who had been working on the day shift when the jobs were opened to women had the opportunity to transfer to the night shift. Brief, *supra* at n.63b.

Accordingly, neither the legislative history nor the decisions in *Square D* and *American Can* justified the revision of the "reduction proviso" made by the Second Circuit.

Further, there are good reasons why the Act reads as it does and why the courts should not rewrite it to require that the lower rated job must always be increased to the higher rate.

Congress intended to afford maximum flexibility to free collective bargaining in adjusting rate relationships. An example of this intention to allow a maximum of freedom in setting rate relationships is found in statements made, in the course of debate on the bill, by Congressman Goodell that Congress wanted:

> "[T]he private enterprise system, employer and employees and a union, if there is a union, and the employer and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it [as long as the pay differentials were not based on sex]." 109 CONG REC. 9198 (House, May 23, 1963), Add. B, B-29, 30.

The decision by the court of appeals eliminates these matters from collective bargaining and mandates an increase in the lower rate even if the employer and the union believe that the jobs should not bear the same wage rate. This will usually be disruptive of the many rate interrelationships among the jobs which are being litigated and the other jobs in the employer's establishment. This disruption can have far reaching effects upon employee job bidding tendencies and create employee dissatisfaction with rate inequities caused by this disruption.

The above-quoted statements of Congressman Goodell reaffirm the principle that the executive as well as the judicial branch of the federal government is not to alter the wage payments made by Corning subsequent to June 1, 1966, unless it is proved that those payments violate some provision of the Act.

Sound policy against judicial legislation also suggests that the Second Circuit's holding was improper. The Equal Pay Act, as enacted, set forth two requirements: (1) that the employer not discriminate between the sexes in paying wages and (2) that no employee's wage be reduced in order to reach that state of non-discrimination. Corning's conduct since June 1, 1966, clearly satisfied both requirements. A judicial rewriting of the statute so that "shall not . . . reduce" means "shall increase" introduces uncertainty into all of our laws. Such a construction, even when done with the best of intentions, is an improper exercise of the judicial function.

As Mr. Justice Cardozo stated:

> "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).[83]

In *United States v. Calamaro*,[84] 354 U.S. 351 (1957), this Court stated:

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[83] *Anderson v. Wilson*, 289 U.S. 20 (1933), involved the issue of whether the difference between the value of real estate at the death of a testator and the proceeds realized thereafter upon a sale by the trustees may be deducted as a loss by the taxpayer, the beneficial owner of the proceeds, upon his tax return of income for the year of sale.

[84] *United States v. Calamaro*, 354 U.S. 351 (1957), involved the question of whether a "pick-up man" in a type of lottery called the "numbers game," was subject to the annual $50 special occupational tax imposed by the wagering tax provisions of the Internal Revenue Code.

> "Neither we nor the Commissioner [of Internal Revenue] may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." 354 U.S. 351, 357.

For the reasons set forth above, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since June 1, 1966.

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

Corning submits that its 1969 labor agreement, effective January 20, 1969, achieved compliance with the Act.

This agreement, which included a new job evaluation plan, established a single "job evaluated" rate for each of the disputed jobs, which was the same for all three shifts.[85] This "job evaluated" rate was higher than the night shift inspection rate had been prior to the 1969 agreement, as well as higher than the night shift inspection rate had been on June 1, 1966, when the night shift inspection jobs were opened to women.[86] The New York district court found that the 1969 "job evaluated" inspection rate, along with the rates for all other jobs in Corning, had been fixed in a "fair, non-discriminatory manner not based on sex."[87]

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[85] Brief, *supra* at 11-12.

[86] Brief, *supra* at 11.

[87] App. (2d Cir.) 183, W.D. N.Y. F.F.

In reference to the 1969 agreement the Second Circuit stated:

> "If the agreement had stopped at that point, there would be no substantial claim of further violation of the Equal Pay Act." App. (2d Cir.) 200.

However, the Second Circuit further ruled that a violation had occurred after January 20, 1969, the effective date of the agreement, solely because Corning and the union had agreed that *any* employee who had been hired before January 20, 1969, would receive a "red circle" rate higher than the "job evaluated" rate.[88]

The "red circle" rate was payable to any person (regardless of sex) who worked the night shift inspection job, regardless of whether that person had been working as an inspector or in another type of job as long as that person had been employed prior to the effective date of the 1969 agreement.[89]

The "red circle" rate was not applicable to persons hired after the effective date of the labor agreement.[90]

The Second Circuit's reasoning on this point is not justifiable under either the terms of the Act or the premises adopted by the Circuit in its rationale supporting its decision.

The Second Circuit had found[91] that had Corning not agreed to pay more than the "job evaluated" rate, the violation would have terminated. That finding recognizes that

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[88] App. (2d Cir.) 200, 211-12.

[89] Brief, *supra* at 12.

[90] *Id.*

[91] App. (2d Cir.) 200, 211-12. This determination was clearly correct. The rate paid to day inspectors exceeded both the rate paid to night inspectors prior to June 1, 1966, and the rate paid to night inspectors prior to the 1969 agreement. Brief, *supra* at 11.

the "job evaluated" rate, set by the January, 1969, labor agreement had removed any and all conceivable effects of past discrimination in the payment of wages to the day inspection jobs. There is no other explanation for that ruling.

The Second Circuit, however, held that Corning and the union could not set a rate for night shift inspection work which exceeded that paid for day shift inspection work. The Circuit Court held that:

> "'[T]he "red circle" rate paid to night shift inspectors perpetuates the discrimination of the "supplemental escalating shift differential"'—the euphemism Corning has coined for the excess base wage rates paid to inspectors on the night shift." App. (2d Cir.) 212.

The Second Circuit focused upon the fact that a different rate still existed for night inspection work and *ipso facto* found that a violation continued to exist.

This conclusion was erroneous. No discrimination on the basis of sex occurred by reason of the creation of the "red circle" rate. The statistics clearly establish that by 1969, women had transferred in great numbers to the night shift and would receive the "red circle" rate.[92]

If the lower "job evaluated" rate is "fair, non-discriminatory" and "not based on sex," then it should not be a violation to pay an even higher rate to all persons, including as many women as men, who work at night.

The Second Circuit's holding is also clearly contrary to the legislative intention of allowing wide latitude to the free process of collective bargaining to establish wage rates.[93]

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[92] Brief, *supra* at 9-11.

[93] Statements of Congressman Goodell, Brief, *supra* at 48.

The Second Circuit has held that, in respect to all persons employed prior to January 20, 1969, Corning must raise the admittedly fair and non-discriminatory "job evaluated" day rate to the level of the "red circle" rate. The "job evaluated" rate was established in relation to all jobs in the Corning, New York, plants—not only the disputed jobs.[94] Thus, the Second Circuit has required Corning to create an inequity in rate relationships which inequity can only be resolved by raising, at an immense cost, the entire wage curve, affecting all jobs.

Many employers who are faced with the dual problems of a violation or potential violation of the Equal Pay Act and of bargaining with a union will inevitably seek a sensible means of compliance which will run afoul of the holding of the Second Circuit.

For the reasons set forth above, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since January 20, 1969.

[94] App. (2d Cir.) 183, W.D. N.Y. F.F.

Conclusion

For the reasons stated, it is respectfully submitted that the determination of Question I by the Court of Appeals for the Third Circuit was correct and that the determination of that Question by the Court of Appeals for the Second Circuit was incorrect. Accordingly, it is requested that the judgment of the Court of Appeals for the Third Circuit in case No. 73-695 be affirmed and the judgment of the Court of Appeals for the Second Circuit in case No. 73-29 be reversed and judgment entered for Corning. If this Court determines that the Court of Appeals for the Third Circuit erred in its resolution of Question I, then case No. 73-695 should be remanded to the Court of Appeals for the Third Circuit for proceedings consistent with this Court's determination on Question I. Further, the facts of the lawsuit from which case No. 73-695 has arisen differ from case No. 73-29 in various material respects which relate to Questions II and III. Accordingly, if this Court determines that the United States Court of Appeals for the Third Circuit should be reversed on Question I, then case No. 73-695 should be remanded to the Court of Appeals for the Third Circuit for a full consideration of all the issues. There are numerous legal issues involved in the lawsuit from which case No. 73-695 has arisen, in addition to the Questions Presented in the instant Brief.

It is requested that the judgment of the Court of Appeals for the Second Circuit be reversed in regard to Question II, and that this Court determine that Corning has been in compliance with the Act since June 1, 1966, and that the judgments of the Western District of New York and the Court of Appeals for the Second Circuit be modified accordingly.

It is requested that the judgment of the Court of Appeals for the Second Circuit be reversed in regard to Question III and that this Court determine that Corning has been in compliance with the Act since January 20, 1969, and that the judgments of the Western District of New York and the Court of Appeals for the Second Circuit be modified accordingly.

Respectfully submitted,

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January 23, 1974.

ADDENDUM A

Equal Pay Act

HEARINGS

BEFORE THE

SPECIAL SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3861 and Related Bills

TO PROHIBIT DISCRIMINATION, ON ACCOUNT OF SEX, IN THE PAYMENT OF WAGES BY EMPLOYERS ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE AND TO PROVIDE FOR THE RESTITUTION OF WAGES LOST BY EMPLOYEES BY REASON OF ANY SUCH DISCRIMINATION

HEARINGS HELD IN WASHINGTON, D.C.,
MARCH 15, 25, 26, AND 27, 1963

Printed for the use of the Committee
on Education and Labor
ADAM C. POWELL, *Chairman*

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Hearings, p. II

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[63] Mr. GRIFFIN. Getting into some of the practical problems of making this law work—and, as I indicated at the outset, I think this is the area to which the concern is largely directed—let me give you a situation which may not be typical, but certainly is within the realm of possibility. There may be a problem in one provision of this proposed bill. The bill, in effect, says that where a violation is determined by the Secretary to exist, that the only way it can be remedied is for the wages to be raised.

This may not always benefit the ladies, although I assume most of the time it will.

I am thinking of the situation in a restaurant, for example, where a poor male waiter is competing with a nice looking blonde. In some instances, this law may help the members of my sex. In addition, there is the situation of dancers and entertainers, and so forth. I do not know what you are going to do, Mr. Secretary, to determine if there is discrimination in some of these areas.

Secretary WIRTZ. I can look into that case. [Laughter.]

Mr. GRIFFIN. Let us take a situation where there is a production line. Fifty women work for one wage and, let us say, one man, who happens to be the boss' nephew receives 50 cents an hour more. Across the street, a competitor in business has no men working at all. The women in both places are making the same wage. I also assume there would be a violation here, and I assume the only way it could be corrected would be to raise the 50 women 50 cents so they would receive the same pay as the boss' nephew, or am I mistaken, in the bill?

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Secretary WIRTZ. Yes; I think there is another approach. I think if I were the boss, I would forget nepotism at that point and get rid of the man whom I was paying 50 cents more just because he was my nephew. And I do not mean this lightly, Congressman, because your reference is to a set of situations which we have thought through, and realize might present some difficulty, and if there were an artificiality of that kind, I would think that good business would prompt putting him in his will instead of on his payroll, and removing this fact.

Mr. GRIFFIN. That is very interesting, and I think should be the right answer in a situation like this. Let us change the facts a little. There is a collective bargaining agreement in a particular establishment. The one man does not happen to be the boss' nephew, but he is receiving 50 cents an hour more. The only thing he does different than the ladies is to take the box off the end of the line and put it on the floor.

Now, the employer thinks—and perhaps the union in this situation also thinks—this is enough of a difference in the work so that they are all right.

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[64] I do not know at this point—and I do not know if you would know at this point—whether that would be enough of a difference in job content to justify saying that this is or is not "equal work." However, suppose that your department came along later and said, "No, this is equal work, within our regulations, and therefore you have to come into compliance and raise the 50 women 50 cents an hour."

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Secretary WIRTZ. I do not mean to mimimize the problem. I am perhaps entitled to say that in previous experience as a labor arbitrator, I have encountered, I suppose, a hundred or a hundred fifty, maybe 200, of these equal pay cases. It is a problem in the administration of a collective bargaining agreement and, therefore, I do not mean to minimize it; but I would add from that experience, too, that the result in most cases of this kind which come up under collective bargaining from time to time is that the matter is worked out on some adjustment basis.

I think probably it is true that private arbitration in the equal pay for equal work cases result more frequently than in any other class of grievance cases in recognizing that you have a problem which ought to be worked out by adjustment rather than enforcement.

Now I couple that experience with the experience that we have in the administration of the Walsh-Healey Act and the Fair Labor Standards Act where again our experience is that about 95 percent of all cases of violation result in voluntary compliance or an adjustment.

I would assume that the only fair answer to your question is that those problems will arise, and the procedures must be sufficiently flexible to permit the largest degree of practical working out of those situations, reserving the sanctions of enforcement only for the very few cases in which it remains.

I would repeat again that there is nothing in the act as proposed which would preclude his making administrative, managerial shifts of employment which would resolve the

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most extreme cases of that kind which might arise. I do not mean to duck the implications of your question. The proposal is—and I think almost necessarily—legislation which suggests that if the problem cannot be met by any of those approaches then the lower wages would be brought up to the higher level.

I am going to say that I think we are talking about a problem which will be serious as a matter of administration, but the unusual problem.

Mr. GRIFFIN. Mr. Secretary, I think this sort of brings up the question of whether or not the sole purpose of this legislation is to eliminate discrimination on the basis of sex, or whether this legislation has another purpose; namely, to raise wage levels in this country. If the only way violations of the law can be remedied is to raise wage levels, it is going to have that effect; is it not?

Secretary WIRTZ. Yes.

I did not mean to interrupt. Is that your question?

Mr. GRIFFIN. Yes.

Secretary WIRTZ. The purpose of it is to eliminate the differentiation and is exclusively that.

Mr. GRIFFIN. Why, then—I am not suggesting that in every case the man should be fired or that in every case the man's wage should be lowered to the women's wage; how-

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ever, I am suggesting that there [65] may be situations where it may be necessary in order for a particular employer to stay in business, to have some accommodation between the wages paid to the men and the women. It might be equitable to pay a wage that would be somewhere in between, a wage that all would agree upon. But, as I understand it, the proposed bill would not permit that to happen.

The only way a violation could be remedied under the bill —and certainly a union is going to insist on it—is for the lower wages to be raised to the higher.

It seems to me there is a serious problem here that we ought to face.

Secretary WIRTZ. Of course, the questions are put and the answers recognize that this was a matter of a good deal of discussion last year in connection with this legislation, and I am not sure how much I can add to that really very extensive consideration.

I can only say that again, it would seem to me that this is a matter which will arise most infrequently. My immediate reaction is a little different from the one you have suggested about the treatment which would result in a mutually satisfactory settlement as far as all the parties are concerned.

I think of a case that has come up under one of the State laws, Congressman Griffin, in which there was a settlement of about that same kind.

In that case there was an adjustment worked out in a situation apparently about like the one that you have posited here, in which there was an adjustment of both

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the rates, to bring them into accommodation, and I can only say that with whatever question there may be about the letter of the act, if the situation presented itself to me as administrator under the act, in which a mutually satisfactory arrangement of that kind had been made, my every disposition would be to accept that mutually satisfactory arrangement.

Mr. GRIFFIN. Of course, whenever we raise questions of this nature it is not unusual for the administrator at the present time to say, "Well, if this came to me, I would not do such and such," but we cannot legislate on the basis that you will always be the Secretary of Labor.

Secretary WIRTZ. Completely right, and—

Mr. GRIFFIN. Of course, we expect you will be for a while at least—

Secretary WIRTZ. You shame me, nor could I answer the question fairly in those terms, and I will withdraw that part of the answer, and I would simply say in a general way—well, let's let the matter end there. I appreciate your point.

Mr. GRIFFIN. I have taken more than my allotted time, Mr. Chairman, and I yield the floor.

Mr. THOMPSON. Mr. Secretary, I gather, then, that in response to Mr. Griffin's earlier question that it is not the intention of the Department or of yourself to have this become law in order to raise wages, but rather to establish the principle of equal pay for equal work, and some means by which to enforce it. Is that correct?

Secretary WIRTZ. That is right, Mr. Chairman.

ADDENDUM B

House Report No. 309, 88th Cong., 1st. Sess. (1963)

THE Committee on Education and Labor, to whom was referred the bill (H.R. 6060) to prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an "equal pay for women" policy.

During the 87th Congress the Committee on Education and Labor considered a number of "equal pay" bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on "equal pay" legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of "equal pay" legislation and submitted a draft bill.

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These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

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PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act.

The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to compliment the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to

the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few if any new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

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This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management con-

tracts, enforcement is deferred for 1 additional year or until the termination of the contract, whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantially amended during consideration on the House floor. However, the administration this year adopted only a few of the changes made on the floor last year. Its proposal was embodied in H.R. 3861. On March 25 Congressman Goodell introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. Virtually all of the proposals of the Goodell bill were accepted by the House subcommittee, and are now embodied in H.R. 6060.

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Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:

1. The prohibition against discrimination because of sex is placed under the present Fair Labor Standards Act, with the act's established coverage of employers and employees.

2. All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under the existing Wage and Hour Division, thus avoiding the creation of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

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7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

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Addendum B
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ADDITIONAL MINORITY VIEWS

The equal pay bill, H.R. 6060, as presently written, is objectionable unless amended. The bill, as presently drawn, grants a complete hunting license to the investigators and the Department of Labor in connection with checking a business.

H.R. 6060 amends the Fair Labor Standards Act which does not grant regulatory power to the Secretary for section 6 of that act to which the equal pay amendment would be added. At first glance, H. R. 6060 might be favored, but this would be a gross oversimplification. The difference is more apparent than real. Under Fair Labor Standards Act, the Secretary has the right, and he exercises it, to issue opinion, interpretative bulletins, and questions and answers. These are issued without hearings and have the effect of regulations.

The Supreme Court of the United States established the legal similarity between regulations and interpretations when it said:

> "There is no statutory provision as to what, if any deference courts should pay to the Administrator's conclusions * * *. We consider that the rulings, interpretations and opinions of the Administrator under this act, while not controlling upon the courts by reason of their authority [do] constitute a body of experienced and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control" (Skidmore et al. v. Swift and Company, (1944), 65 S.Ct. 161, 323 U.S. 134, 89 L.Ed. 124).

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In H.R. 6060, the Secretary of Labor through the field of investigators of the Wage and Hour Division, armed with the Secretary's interpretations and opinions, are free to investigate and enforce at will.

The grant of authority which permits these field investigators to look for trouble, to seek out alleged pay discrimination with the same vigor with which they now seek insignificant and technical pay or overtime violations should be strenuously resisted. This was a major defect in the original administration equal pay bill.

Under H.R. 6060, the Secretary gives interpretations and opinions without hearings which have the effect of regulations. The broad unrestricted hunting license given to wage and hour investigators under H.R. 6060 is not needed in an equal pay bill and should not be tolerated.

I intend to offer an amendment which would limit the investigators' authority only to the field of the filed complaint.

Unless the approach in H.R. 6060 is amended to restrict investigations to written complaints by aggrieved employees, it should be vigorously and actively opposed.

DAVE MARTIN.

Addendum B
H. R. Rep. No. 309

ADDITIONAL VIEWS.

This bill states the commendable objective of improving job opportunities for women, but in my opinion it shows little promise of reaching that goal. The uncertainty in achievement is reflected in the mixed attitude of those supporting this bill.

Some support it as a gallant gesture to the fairer sex but insist that the legislation, if enacted, "won't amount to a hill of beans." They point to little-enforced similar legislation in some 20 States of the Union.

Still others are convinced it would be enforced. They predict it would cause employers to quit hiring women for some jobs and thus it would be a subtle but effective way to get some women out of the labor force. They support it for that reason.

A small-scale employer myself (country weekly newspaper), I believe in the principle of equal pay for women and have always tried to put this principle into practice. But I also believe legislation can sometimes do more harm than good no matter how noble the motive.

It would be risky to assume that this legislation would gather dust and not be enforced. If the Wage and Hour Division is given the assignment of enforcing equal pay for women throughout the width and breadth of this land, I, for one, expect the bureaucratic machinery to be fully staffed in short order and, from that moment on, move inexorably forward.

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Although this bill may have motives in the finest tradition of gallantry, it actually is about as ungallant as a kick in the shins.

Testimony before the subcommittee suggests that its enactment would worsen rather than improve job opportunities for women. One executive, for example, said his company has made studies which show the average cost of employing women is about 30 cents an hour more than in the case of men. These costs relate to rate of turnover, flexibility for overtime hours, and special facilities—not to performance when on the job.

Most of these extra costs arise from the indisputable fact that women are more prone to homemaking and motherhood than men. No one of my acquaintance would for the world want to change this fact, but it is one that enters into personnel costs. It will necessarily be considered by management in establishing wage and salary policies whether this bill passes or not.

Under the compulsion in this bill, employers who contend that employment costs for women are higher than for men will tend to cut back on female employment. The effective date of this legislation is delayed in such a manner to give employers time to make these changes. This legislation has the laudable objective of equal pay for women. If, in practice, it leads to fewer jobs for women, the victory indeed would be Pyrrhic.

PAUL FINDLEY.

Addendum B

S. Rep. 176

As printed in 109 Cong. Rec. 8914-15 (Senate, May 17, 1963)

[8914, Mr. McNAMARA:] Mr. President, like all legislation, S. 1409 contains language which must be expanded by a statement of committee intent as contained in the report which accompanied the bill.

In order that everyone may have a clear view of the committee's intent, I ask unanimous consent that portions of the report (No. 176) be printed in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

• • •

EXHIBIT 1

PURPOSE OF THE LEGISLATION

The objective of this legislation is to insure that those who perform tasks which are determined to be equal shall be paid equal wages.

The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded by equal wages.

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S. Rep. 176

Background of the Legislation

The bill, S. 1409, represents legislation recommended by the administration of President Kennedy. In his letter to Vice President Johnson urging adoption of this legislation, Secretary of Labor Willard Wirtz stressed the importance of congressional action to "eliminate discriminatory pay practices in the channels of interstate commerce." The Secretary cited three major reasons for the enactment of such legislation. (1) The general purchasing power and living standard of workers are adversely affected by discriminatory pay rates. (2) Those employers who follow the practice, thereby realize unfair competitive advantage. (3) The resulting low-wage levels prevent maximum utilization of workers' skills to the detriment of morale which in turn is detrimental to production.

At the present time, there are almost 25 million women in the American working force. It is difficult to find any single industry in the United States which does not depend to a substantial degree upon the skills, talent, and energy of American women. Yet in those statistical analyses that are available, it is overwhelmingly apparent that these important contributions by women are not rewarded in the same manner as are similar contributions by men. The committee would call particular attention to the testimony of Assistant Secretary of Labor Esther Peterson, in the charts and tables which she presented to supplement her testimony.

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Description of the Legislation

S. 1409 is much less complex than other equal pay bills which have been before the Congress. With a minimum of language this bill amends the Fair Labor Standards Act to provide that equal work must be compensated with equal pay, regardless of the sex of the workers.

The Fair Labor Standards Act provides, at present, that employers must pay that amount of wages which the Congress deems to be the minimum necessary for decency and basic human needs, soon to be firmed at $1.25 an hour; that employers who require the services of their employees beyond a 40-hour workweek must provide additional compensation to such employees at a time-and-one-half rate; and that the Secretary of Labor has the power to prescribe the condition and hours of work for children.

To those laudable protections, S. 1409 adds the additional requirement that no employee can be paid a wage rate less than that given to another doing the same work, because of his or her sex.

Coverage

One of the advantages S. 1409 offers over other proposed equal-pay legislation is the consistency of coverage with existing legislation. Only those employers who are now subject to the Fair Labor Standards Act will be included within the coverage of S. 1409. Other legislation introduced in this Congress would have required any employer in commerce with 25 or more employees at a single place of employment to comply with proposed equal pay legislation as a consequence, many employers not sub- [8915] ject at

present to any labor standards legislation would have been brought under such a bill. The committee believes that the uniformity of application offered by S. 1409 obviates the problems which would be created by any expansion or curtailment of labor standards coverage.

Administration and enforcement

Over the past 25 years the Department of Labor, operating primarily through the Wage and Hour Division, has established a system of administration and enforcement with which covered employers and employees have become familiar. Traditions have been established, implemented by both administrative regulation and court decision, which have become an accepted part of the rules of life in the economic community.

These same procedures and processes will be utilized in the enforcement and administration of the new equal-pay requirements. These established patterns will make the advent of this new legislation as unburdensome for those affected by it as any program we could devise. And perhaps of equal merit is the fact that no new administrative or enforcement structure need be created, since the existing units within the Department of Labor will be quite capable of supervising the new law.

Elements of equal wage

The key requirements of S. 1409 are that an employer may not discriminate in the payment of wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility and are performed under similar

working conditions, except where such a wage differential is based on any factor or factors other than sex."

The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and procedures necessary to a sound administration and enforcement of this act. The committee expects that the Department of Labor in administering the act will take this approach and will take in addition whatever steps are necessary to promote an understanding of the act and the achievement of voluntary compliance. Officials of the Department have assured the committee that they intend to consult with employers, employees, and employee representatives who will be affected by S. 1409 as well as other individuals or groups whose information and expertise in matters relating to equal-pay legislation can be helpful. These consultations will take place prior to the issuance of regulations.

With reference to the application of the equal-pay concept, it was made plain in our hearings that for a number of years knowledge has been accumulating on means to test the relationship between jobs. Knowledge of this kind will be useful in determining equal work and equal skills for the purpose of administering S. 1409.

The National War Labor Board during World War II and the Wage Stabilization Board during the Korean war were required to make comparisons of jobs for equal-pay purposes. Their experience as well as the experience of arbitrators under contract provisions for equal pay, proves comparisons can be made successfully and put to the practical end of administering a Federal equal-pay policy as contained in S. 1409.

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In making comparisons it has been shown that the factors affecting job content listed below may be useful: education, skill, experience, responsibility, quality and quantity of work, initiative, and ingenuity, physical effort, mental effort, hazardous or objectionable labor, and working conditions.

Exception to equal-pay requirement

S. 1409 is designed to eliminate any wage rate differentials which are based on sex. Neither the committee nor anyone proposing equal-pay legislation intends that other factors cannot be used to justify a wage differential. For example, a woman and a man can be doing precisely the same work at adjacent posts, and yet the man may be earning substantially more than the woman, or vice versa, because of his or her tenure on the job. Such seniority systems are valid exceptions provided they are based on tenure and not upon sex.

Similarily, a merit system or piecework system which measures either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same type of work. Obviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements. Without question, employers have other valid classification programs which can justify an exception.

During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not

encounter in the employment of men. Employer witnesses called the committee's attention to the higher turnover rate among women employees because of marriage or maternity. They also cited a higher absentee rate among certain age groups of women which results from the dual role which a number of women play, that of not only worker but also wife and mother. Some employers stated that the cost of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits.

This question of added cost resulting from the employment of women is one that can be only answered by an ad hoc investigation. Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. It has been pointed out that the higher susceptibility of men to disabling injury can result in a greater cost to the employer, and that these figures as to health and welfare costs can only be applied plantwide. It may be that it is more expensive to hire women in one department but it is more expensive to hire men in another, and overall cost figures may demonstrate conclusively that the employer has made a sound decision to hire women and pay them on an equal basis.

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It is the intention of the committee that where it can be shown that, on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.

Prohibition against wage reduction

This measure is intended to provide for equality of compensation. It is certainly not the intent of the committee that any individual's present economic status should be adversely affected by the enactment of this legislation. As a consequence, the bill provides that no employer, in order to comply with the other provisions of the act, can reduce the wages of any employee.

Effective date

The committee realizes that many employers, who may now be paying wage differentials that are based solely on sex, might face a severe hardship if compliance were made an immediate requirement. As a consequence the bill provides that the date of enforcement is to be a year after the date of enactment.

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109 Cong. Rec. 9193 (House, May 23, 1963)

[9193] Mrs. FRANCES P. BOLTON. Mr. Speaker, as a long-time advocate of the principle of equal pay for equal work, I am very glad to speak in favor of H.R. 6060. I am very much interested in the remarks of the previous speaker because it is some time since the women of this country have been in the minority. We are rather far ahead of you in that regard, my distinguished colleague. Of course, if you care to be the spokesman for the actual minority. Equal pay legislation has been introduced in every Congress since 1945 by Members of both parties, a truly bipartisan effort.

The bill which is now before us is essentially the same as the one introduced in March of this year by the distinguished gentleman from New York [Mr. GOODELL]. It is a very logical approach to the problem in that it places administration of equal pay under the Fair Labor Standards Act. This alleviates the fear voiced by many that passage of such a bill would lead to the establishment of a new bureaucracy with a new set of rules and a new set of investigators. The procedures under the Fair Labor Standards Act are already well established. However, let me remind you of what the gentlewoman from New York [Mrs. ST. GEORGE] has already told us, that this bill in no way covers all the women workers of this country. Indeed, it leaves out a very great many of them. So I would like to consider this bill and have you consider it as one of the first steps toward an adjustment of balance in pay for women.

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[9195] Mr. FRELINGHUYSEN. Mr. Chairman, I yield myself 6 minutes.

Mr. Chairman, I rise in support of H.R. 6060. Perhaps, as the gentlewoman from New York has stated, this proposal is too little and too late. Perhaps, as the gentlewoman from Ohio says, this is only the first step in the right direction.

Mr. Chairman, passage of this bill will mark an important milestone in the campaign for equal rights for women. Its aim is simple, few will argue about the desirability of what it seeks to achieve. Under its provisions, the women of America will be assured of equal pay when they perform equal work. This undeniable right is now to be bolstered and secured by appropriate legislative action.

As you know, Mr. Chairman, last July, during consideration of this question on the floor of the House, a number of Republican amendments were adopted. Unfortunately, the administration incorporated only a few of these changes when it submitted a new equal pay bill, H.R. 3861, this year. The shortcomings of the administration proposal were numerous, and our committee had some difficulty in working out a satisfactory bill.

Fortunately, on March 25, the gentleman from New York [Mr. GOODELL] introduced H.R. 5605. This bill, for the first time, placed the administration and enforcement of equal pay legislation under the Fair Labor Standards Act. This concept was the catalyst that had been needed. Very quickly this proposal was accepted by the members of the subcommittee. The full committee then voted its

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approval. Finally, last week the other body passed a bill, S. 1409, which is similar in all major respects with the bill now before us.

However, H.R. 6060 differs substantially from both last year's proposals and this year's administration bill.

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[9196, Mr. THOMPSON:] This legislation does not affect the wage of women vis-a-vis women or men vis-a-vis men. It only applies to instances where men and women are doing work and where there is a wage differential based solely on sex. It would make a violation of its provisions an unfair labor practice. The lower wage rate must be increased to the higher level so that there will not be an adverse effect on already established wage patterns. The language recognizes that there are many factors used to measure the relationship between jobs and which establish a valid basis for a difference in pay. We do not want to disturb these. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination. Thus among other things shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be exempted under this act.

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[9197] Mr. GOODELL. Mr. Chairman, I want to commend the gentleman from New Jersey [Mr. THOMPSON] as chairman of the subcommittee, for, I think, drastically changing

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and improving this legislation over what it was last year and over what was proposed earlier this year. His bill now is virtually my bill of March 1963, introduced at a time when no bill in either body of the Congress took the fair labor standards approach to equal-pay-for-women legislation.

Mr. Chairman, I want to make one major point here: Some of our colleagues are disturbed because they feel that there may be a broad, regulatory power granted to the Secretary of Labor, and I want to make it clear and have the confirmation of the chairman of the subcommittee that there is no general regulatory power granted to the Secretary of Labor under this legislation, that he will have no such power if this legislation in its present form passes the Congress.

Mr. THOMPSON of New Jersey. I agree with the gentleman from New York emphatically.

Mr. GOODELL. I thank the gentleman from New Jersey.

Mr. FRELINGHUYSEN. Mr. Chairman, I yield 10 minutes to the gentleman from Michigan [Mr. GRIFFIN].

Mr. GRIFFIN. Mr. Chairman, I want to commend the gentleman from New Jersey, the chairman of this subcommittee, for the very fair and judicious way in which he conducted the hearings and the deliberations on this legislation. As has been indicated, the bill was not handled in a hasty manner. I am glad to say that the recommendations and the arguments of the minority in this case were always given very careful consideration. Indeed, the proposal made by the gentleman from New York [Mr. GOODELL]

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that the legislation should be an amendment to the Fair Labor Standards Act was a very major difference from the bill presented by the administration. The subcommittee, as well as the full Committee on Education and Labor, saw fit to adopt the approach proposed by the gentleman from New York [Mr. GOODELL]. I consider it to be a good approach, a good way to implement this basic principle which has been a part of the platforms of both of the great political parties. I refer, of course, to the principle that there should be no discrimination in the payment of wages on the basis of sex; that there should be equal pay for equal work.

It should be noted in the debate that 38 member nations of the International Labor Organization, in one of its conventions, endorsed the principle of equal pay for equal work. The countries which are members of the European Common Market, in their Rome Treaty, also endorsed this principle.

I consider this bill to be a very good and practical approach. I should like to recall for the committee that in the debate last year there were arguments centering around three amendments or points raised on the floor.

The first such amendment, it will be recalled was offered by the gentlelady from New York [Mrs. ST. GEORGE] who called for use of the term "equal work," rather than "comparable work." It will be recalled that the House adopted her amendment last year.

This bill today speaks in terms of equal work. We go further in this legislation and provide some definition as to what equal work is—what is meant by equal work. The

bill refers to jobs, the performance of which require equal skill, equal effort, equal responsibility, and which are performed under similar working conditions.

Mr. THOMPSON of New Jersey. Will the gentleman yield?

Mr. GRIFFIN. I yield to the gentleman from New Jersey.

Mr. THOMPSON of New Jersey. I am very glad that the gentleman is taking care to explain this. I believe in addition to the gentleman from New York [Mr. GOODELL] that the gentleman deserves a little credit, too, because this particular section or definition of "equal work" was a bothersome one last year. I think that the contribution which the gentleman made in adding these other factors and, rather specific ones, to it is a most valuable contribution.

Mr. GRIFFIN. I thank the gentleman from New Jersey.

Mr. GOODELL. Mr. Chairman, will the gentleman yield?

Mr. GRIFFIN. I yield to the gentleman from New York.

Mr. GOODELL. I also want to commend the gentleman for the very hard work which he did. I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

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We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear.

Mr. GRIFFIN. In other words, would the gentleman agree with me that there would be no basis for comparing, say an inspector with an assembler, for example? The Department of Labor could not say, "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility." It would be appropriate to compare inspectors with inspectors or assemblers with assemblers, but not to compare an inspector with an assembler.

[9198] Mr. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them.

Mr. GRIFFIN. In addition, it would be clear that in comparing inspectors, if one inspects a complicated part of an engine, for example, while another inspector makes only a cursory type of inspection, obviously, the fact that both are inspectors would not mean that they should necessarily receive equal pay.

Mr. GOODELL. I agree with the gentleman. I wish the gentleman would yield on that point to the chairman of

the subcommittee, who made that very point yesterday to the Rules Committee.

Mr. THOMPSON of New Jersey. I do agree with what the gentleman said thus far. The gentleman said the Department of Labor could not, where these differences exist, make such determinations. There are two protections. First of all, the Department is not given that broad discretion and is deliberately restricted in the act to the definition set forth in the act.

Mr. GRIFFIN. I am very glad to have that important contribution.

Mr. THOMPSON of New Jersey. In the event in a very close matter they charge discrimination, it would be incumbent upon them to establish that before a Federal judge. Further, in the case of inspectors, someone asked hypothetically yesterday, Suppose they are doing the same work but one of them at the end of the line lifts the parts and carries them away? Obviously this comes under what we construe to be effort involved. It is an additional matter which clearly obliterates any question that they would be the same.

Mr. GRIFFIN. I thank the gentleman for that important comment.

Mr. GOODELL. I think the point made by the chairman of the subcommittee is important. We discussed earlier the regulatory power. The Secretary may believe that a violation exists but the court will make a second independent judgment. That is very significant. We are not allowing the Secretary of Labor to make decisions which excluded

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the court from an independent new interpretation of this act, as to whether the words we use are being adminstered reasonably and properly.

Mr. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one.

Mr. GOODELL. I would like to pursue the point about differences in efforts of employees. This is perhaps the broadest category we are talking about in comparing jobs.

It should be understood to be a very broad concept. This could involve a great many factors in terms of personal evaluation of continuous performance on the job, if an employee has demonstrated over a period of time that his performance exhibits more effort in the opinion of the supervisor, then a differentiation in pay will be justified. It also may include such factors as willingness exhibited by the employee and by his actions to expend extra effort and to expend a little extra energy. It should be understood that it is not necessarily that the job requires extra effort, but it may be that an employee expends extra effort so that the performance of the employee on the job justifies a special consideration in terms of his pay.

If I may conclude on just that point: It is our intention, I believe, on both sides of the aisle to provide here with the use of the terms "effort," "skill," "responsibility" and "working conditions" a maximum area for the interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In

this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

Mr. GRIFFIN. So long as pay differentials are not based on sex.

Mr. GOODELL. Yes, as long as it is not based on sex. That is the sole factor that we are inserting here as a restriction.

Mr. GRIFFIN. Mr. Chairman, I now yield to the distinguished minority leader.

Mr. HALLECK. Mr. Chairman, without in any way undertaking to detract from the effort that has been put into the drafting of this measure by the majority Democratic side, I would just like to put in a word of commendation at this time for our Republican members on the Committee on Education and Labor for the constructive work that they have been doing in connection with this very important measure. At times, of course, we in the minority are accused of being completely negative in our approach. I have denied that because the facts and the record do not bear out any such contention. I am happy to point out on this particular occasion that here is another evidence of what the minority can do in the way of constructive effort in the drafting of legislation that is of great consequence to the country. As a matter of fact, from what I understand, much of this bill as it now appears before us is the result of these

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minority efforts and efforts that have been adopted or accepted by the majority—and for that I commend them. But, certainly, if anything can be said to be representative of bipartisan action, I think this is such a bill.

Mr. GRIFFIN. I thank the distinguished minority leader very much.

Mr. GOODELL. Mr. Chairman, will the gentleman yield further?

Mr. GRIFFIN. I yield to the gentleman.

Mr. GOODELL. We have been talking about restrictions on the regulatory power. Some of our colleagues have asked where those restrictions are in the bill. I think this is a key point. We are amending the Fair Labor Standards Act. The existing provisions of the Fair Labor Standards Act will apply for enforcement and administration. The Fair Labor Standards Act is very carefully drawn to grant regulatory authority only under certain sections of the act. It does not grant broad regulatory authority or power to issue regulations for the act in general. By this bill we are adding a new subsection of the act and we specifically make it clear that it is to be enforced in the same pattern generally as the Fair Labor Standards Act is today, which means that there is no general power to issue regulations. No power is given to the Secretary in any way to write legislation for the Congress.

Mr. GRIFFIN. I think it should be pointed out that an earlier version of this legislation did contain a section which would have authorized the Secretary to promulgate regu-

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lations. The gentleman from Ohio [Mr. TAFT] provided leadership in this field; and, as a result of his persuasive ability that provision was stricken out. As a result, it should be clear from the legislative history that we do not intend to give the Secretary of Labor any broad regulatory powers. I am sure the gentleman from Ohio [Mr. TAFT] will have more to say on this subject.

Mr. GOODELL. I agree with the gentleman.

The contribution of the gentleman from Ohio was very significant in this respect.

I would like to make specific reference to the report of the other body in reference to regulation, because the other body specifically struck out the power of the Secretary to write regulations, then passed them all over.

I want to quote it because I think it is inaccurate in the other body's report, and we should repudiate it as a part of our legislative history.

They say on page 3 of the report:

> The committee recognizes that the application of this new legislation will require a cautious step-by-step implementation in developing the rules, regulations, and procedures necessary to a sound administration and enforcement of this act.

The implication left there is that the Secretary will have the power to issue rules and regulations, but he would do it on a step-by-step basis. That is entirely wrong, it is an error, and it should be specifically stated.

Later, at the bottom of the paragraph they use another improper reference when they say:

> These consultations will take place prior to the issuance of regulations.

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Again implying there will be regulations. There will not be in the form that the bill passed the Senate, and there will not be in the form that the bill is placed before the House.

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[9208, Mr. GOODELL:] With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, we have three types of guidance that can be offered by the Administrators to those who are being regulated. One of them is legislative regulation. That is the case where Congress in effect tells the Administrator, "You write the law in these areas, you define what we mean." When they get to court under such circumstances the court will often say, "We cannot even go into that [9209] matter. Congress delegated that authority to write regulations, to write the law so do not question that. We are not even considering that here."

That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor even to issue interpretative regulations.

I emphasize that interpretative regulations are also barred. Interpretative regulations involve a case where there is an ambiguity in the law which admits of two or more constructions. Then in that case, if we have given interpretative regulatory authority, the Secretary moves in and tries to say what we meant between the two or three constructions. He does not have such authority here. The Secretary, in my opinion, has the inherent authority to write interpretative bulletins. All this amounts to is tell-

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ing the public the Secretary's interpretation of the law for the guidance of those who are to be regulated. Such bulletins have no standing in court, but they are there as a guidance to the court as to what the view of the administrator was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected. He is not in violation if he has done something in reliance upon those interpretative bulletins.

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Mr. GOODELL. Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting H.R. 6060, the equal-pay-for-women bill:

First. Differences in pay that exist between women alone are not covered by this act.

Second. Differences in pay that exist between men alone are not covered by this act.

Third. Differences in pay between groups or categories of employees that contain both men and women within the group or category are not covered by this act.

Fourth. Only those jobs that are the same and normally related shall be compared.

Fifth. Normally the jobs that are compared will be physically located in the same work area or will fall within closely related job classifications.

Sixth. Differences in pay that are based upon historical and widely accepted differences in job content will not be challenged, if not based on sex.

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Seventh. Differences in pay that are based upon a bona fide job classification system will not violate this act, if not based on sex.

Eighth. It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination.

Ninth. Although only the factors, skill, effort, responsibility, and working conditions are listed, such things as experience, ability, and training may be considered under the broad heading of skill. The usual factors of push, pull, lift, and carry come under effort. Direction of others as well as value of commodity worked upon and overall importance of assignment may be considered as part of an employees' job responsibility. Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor.

Tenth. A difference in pay between male selectors and packers and female selectors and packers who work on the same production line and have the same duties and responsibilities would be invalid.

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Eleventh. A difference in pay between male selectors and packers and female selectors and packers would be valid if, in addition to the duties performed by the female selectors and packers, the male selectors and packers are required to lift the crates off of the assembly line, or sweep up the room or work on the loading dock during slack periods.

Twelfth. An installer's job on an assembly line that, for example, requires soldering could not be compared or equated with a welder's job.

Thirteenth. A truck driver's job and a tug operator's job are dissimilar.

Fourteenth. The work of a machine operator and the work of a skilled machinist cannot be equated.

Fifteenth. Plant and office clerical assignments are normally distinguishable.

Mr. Chairman, the majority views and supplemental views, follow:

EQUAL PAY ACT OF 1963—MAJORITY VIEWS AND SUPPLEMENTAL VIEWS

BACKGROUND

Legislation to eliminate wage discrimination based upon sex of the employee has been recommended by the present and two immediately preceding administrations.

During World War II the War Labor Board promulgated and administered an equal pay for women policy.

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During the 87th Congress the Committee on Education and Labor considered a number of equal pay bills, reported favorably to the House of Representatives and a bill was enacted. The other body also acted favorably on equal pay legislation, but its affirmative action took the form of an amendment to a House-approved bill, the subject matter of which was outside the jurisdiction of the Committee on Education and Labor.

Following the convening of the 88th Congress many Members of the House of Representatives reintroduced bills they had sponsored during prior Congresses. On February 14, in a letter to the Speaker of the House of Representatives, Secretary of Labor Willard Wirtz recommended enactment of equal pay legislation and submitted a draft bill.

These bills were assigned to this committee's Special Subcommittee on Labor for hearings and preliminary consideration.

The bill (H.R. 6060) represents the results of this deliberation.

Oral testimony was heard from 20 witnesses, and many statements and letters were submitted for the record.

The committee was impressed by these points:

1. Proponents urged legislation that would protect maximum numbers of employees, and that had enforcement procedures.

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2. Some witnesses expressed concern that they might be faced with unusual difficulties in adjusting to an entirely new Federal program administered by a new agency.

3. Many of the separate provisions of the administration's proposal closely parallel provisions of the Fair Labor Standards Act.

4. A number of witnesses recommended that various specific provisions be rewritten in precisely the terms of the Fair Labor Standards Act; and one witness recommended that elimination of sex-based wage discrimination be accomplished by amending section 6 of the Fair Labor Standards Act.

PURPOSE AND SUMMARY OF MAJOR PROVISIONS

This bill amends the Fair Labor Standards Act to provide that payment of a discriminatory wage rate, where the discrimination is based on sex of the employee, shall in the future be a violation of the Fair Labor Standards Act. [9210] The Fair Labor Standards Act provides that workers must be paid a decent minimum wage, that if employees must put in long hours, they must be paid at an overtime rate, and that children may be employed only under rigid conditions which protect their health and safety.

The bill (H.R. 6060) would add one additional fair labor standard to the act; namely, that employees doing equal work should be paid equal wages, regardless of sex.

Because of the long history and experience of Government and business and workers with the Fair Labor

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Standards Act, a simple expansion of that act to include the equal pay concept offers the most efficient and least difficult course of action.

The Fair Labor Standards Act has been on our statute books now for almost a quarter of a century.

Over that time the Wage and Hour Division of the Department of Labor, which has the responsibility for enforcement of such act, has developed a now familiar system of investigation, administration, and enforcement, which will be utilized fully to compliment the new provision. Moreover, Secretary of Labor Willard Wirtz in a letter to the committee has given his assurance that he will assign the administration of the equal pay legislation to the Wage and Hour Division. Very few, if any, new employees will be required to enforce the act.

Such utilization serves two purposes: First, it eliminates the need for a new bureaucratic structure to enforce equal pay legislation; and second, compliance should be made easier because both industry and labor have a long-established familiarity with existing fair labor standards provisions.

Perhaps the most worthy result in this approach is in the question of coverage. This bill neither extends nor curtails coverage of the Fair Labor Standards Act but simply provides that those employers and employees who are presently covered by that act shall be covered by the new provisions relating to equal pay for equal work, regardless of sex. The Fair Labor Standards Act covers an estimated 27,500,000 employees.

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Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based solely on the sex of the employee are an unfair labor standard. The lower wage rate must be increased to the level of the higher.

The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." This term is borrowed from War Labor Board

parlance and describes certain unusual higher than normal wage rates which are maintained for many valid reasons. For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs.

Section 4 provides a 1-year moratorium on enforcement as to all employees and employers. In addition, in the case of employees covered by bona fide labor-management contracts, enforcement is deferred for 1 additional year or until the termination of the contract whichever occurs first.

During this "grace period" your committee expects the Secretary of Labor to make such changes in the administration of the Fair Labor Standards Act as are necessary to reflect this amendment. The committee would anticipate that, at an early date, full information including material to be posted, would be given employers and employees covered by the Fair Labor Standards Act. We would expect that by informal methods of conference, consideration, and persuasion, efforts would be made to achieve voluntary compliance.

The proposed grant of authority to the Secretary of Labor to issue regulations in connection with the administration and enforcement of this program was eliminated by the subcommittee. The Secretary of Labor will have only the specific and limited regulatory authority for the enforcement and administration of the Equal Pay Act which he has under the present Fair Labor Standards Act.

Addendum B

109 Cong. Rec. 9210 (House, May 23, 1963)

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in black brackets, existing law in which no change is proposed is shown in roman):

SECTION 6 OF THE FAIR LABOR STANDARDS ACT OF 1938

"SEC. 6. (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce wages at the following rates—

"(1) not less than $1.15 an hour during the first two years from the effective date of the Fair Labor Standards Amendments of 1961, and not less than $1.25 an hour thereafter, except as otherwise provided in this section.

"(2) if such employee is a homeworker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order, or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Secretary of Labor, or his authorized representative, shall have power to make such regulations or orders, as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting

the generality of the foregoing, to define any operation or occupation which is performed by such homework employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term 'homeworker'; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by homeworkers;

"(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b), not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands, by this Act as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this Act to employees employed in American Samoa as pertain to special industry committees established under section 5 with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection.

"(b) Every employer shall pay to each of his employees who in any workweek (i) is employed in an enterprise

engaged in commerce or in the production of goods for commerce, as defined in section 3(s)(1), (2), or (4) or by an establishment described in section 3(s) (3) or (5), and who, except for the enactment of the Fair Labor Standards Amendments of 1961, would not be within the purview of this section, or (ii) is brought within the purview of this section by the amendments made to section 13(a) of this Act by the Fair Labor Standards Amendments of 1961, wages at rates—

"(1) not less than $1 an hour during the first three years from the effective date of such amendments; not less than $1.15 an hour during the fourth year from such date; and not less than the rate effective under paragraph (1) of subsection (a) thereafter;

"(2) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement).

"(c) The rate or rates provided by subsection (a) and (b) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands only for so long as and insofar as such employee is covered by a wage order heretofore or hereafter issued by the Secretary

pursuant to the recommendations of a special industry committee appointed pursuant to section a: *Provided,* That (1) the following rates shall apply to any such employee to whom the rate or rates prescribed by subsection (a) would otherwise apply:

"(A) The rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, increased by 15 per centum, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C). Such rate or rates shall become effective sixty days after the effective date of the Fair Labor Standards Amendments of 1961 or one year from the effective date of the most recent wage order applicable to such employee theretofore issued by the Secretary pursuant to the recommendations of a special industry committee appointed under section 5, whichever is later.

[9211] "(B) Beginning two years after the applicable effective date under paragraph (A), not less than the rate or rates prescribed by paragraph (A), increased by an amount equal to 10 per centum of the rate or rates applicable under the most recent wage order issued by the Secretary prior to the effective date of the Fair Labor Standards Amendments of 1961, unless such rate or rates are superseded by the rate or rates prescribed in a wage order issued by the Secretary pursuant to the recommendations of a review committee appointed under paragraph (C).

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109 Cong. Rec. 9211 (House, May 23, 1963)

"(C) Any employer, or group of employers, employing a majority of the employees in an industry in Puerto Rico or the Virgin Islands, may apply to the Secretary in writing for the appointment of a review committee to recommend the minimum rate or rates to be paid such employees in lieu of the rate or rates provided by paragraph (A) or (B). Any such application with respect to any rate or rates provided for under paragraph (A) shall be filed within sixty days following the enactment of the Fair Labor Standards Amendments of 1961 and any such application with respect to any rate or rates provided for under paragraph (B) shall be filed not more than one hundred and twenty days and not less than sixty days prior to the effective date of the applicable rate or rates under paragraph (B). The Secretary shall promptly consider such application and may appoint a review committee if he has reasonable cause to believe, on the basis of financial and other information contained in the application, that compliance with any applicable rate or rates prescribed by paragraph (A) or (B) will substantially curtail employment in such industry. The Secretary's decision upon any such application shall be final. Any wage order issued pursuant to the recommendations of a review committee appointed under this paragraph shall take effect on the applicable effective date provided in paragraph (A) or (B).

"(D) In the event a wage order has not been issued pursuant to the recommendation of a review committee prior to the applicable effective date under paragraph (A) or (B), the applicable percentage increase provided by any such paragraph shall take effect on the effective date prescribed therein, except with respect to the employees

of an employer who filed an application under paragraph (C) and who files with the Secretary an undertaking with a surety or sureties satisfactory to the Secretary for payment to his employees of an amount sufficient to compensate such employees for the difference between the wages they actually receive and the wages to which they are entitled under this subsection. The Secretary shall be empowered to enforce such undertaking and any sums recovered by him shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts.

"(2) In the case of any such employee to whom subsection (b) would otherwise apply, the Secretary shall within sixty days after the enactment of the Fair Labor Standards Amendments of 1961 appoint a special industry committee in accordance with section 5 to recommend the highest minimum wage rate or rates in accordance with the standards prescribed by section 8, not in excess of the applicable rate provided by subsection (b), to be applicable to such employee in lieu of the rate or rates prescribed by subsection (b). The rate or rates recommended by the special industry committee shall be effective with respect to such employee upon the effective date of the wage order issued pursuant to such recommendation but not before sixty days after the effective date of the Fair Labor Standards Amendments of 1961.

"(3) The provisions of section 5 and section 8, relating to special industry committees, shall be applicable to review

committees appointed under this subsection. The appointment of a review committee shall be in addition to and not in lieu of any special industry committee required to be appointed pursuant to the provisions of subsection (a) of section 8, except that no special industry committee shall hold any hearing within one year after a minimum wage rate or rates for such industry shall have been recommended to the Secretary by a review committee to be paid in lieu of the rate or rates provided for under paragraph (A) or (B). The minimum wage rate or rates prescribed by this subsection shall be in effect only for so long as and insofar as such minimum wage rate or rates have not been superseded by a wage order fixing a higher minimum wage rate or rates (but not in excess of the applicable rate prescribed in subsection (a) or subsection (b)) hereafter issued by the Secretary pursuant to the recommendation of a special industry committee.

"[(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying

a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"[(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"[(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"[(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.]"

SUPPLEMENTAL VIEWS

Last year the equal pay for women bill was substantially amended during consideration on the House floor. However, the administration this year adopted only a few of the changes made on the floor last year. Its proposal was embodied in H.R. 3861. On March 25 Congressman GOODELL introduced a new proposal, H.R. 5605, to place administration and enforcement of equal pay legislation under the Fair Labor Standards Act. Virtually all of the

proposals of the Goodell bill were accepted by the House subcommittee, and are now embodied in H.R. 6060.

Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:

1. The prohibition against discrimination because of sex is placed under the present Fair Labor Standards Act, with the act's established coverage of employers and employees.

2. All of the fair labor standards exemptions apply: Agriculture, hotels, motels, restaurants, and laundries are excluded. Also, all professional, managerial, and administrative personnel, and outside salesmen are excluded.

3. Investigation and administration will be under the existing Wage and Hour Division, thus avoiding the creation of a vast new bureaucracy.

4. Enforcement must be obtained in the Federal courts and not arbitrarily through an all-powerful administrative body.

5. The definitions and interpretations of the Fair Labor Standards Act apply. These have been court tested and are generally understood by business and labor.

6. The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility, and similar working conditions as well. These factors are the core of all job classification systems and the basis for legitimate differentials in pay.

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7. A specific exception has been added for a system which measures earnings by quantity or quality of production.

8. A general exception has been added for differentials based on factors other than sex.

9. As the act does not take effect for 1 year following the date of enactment, time is provided for voluntary adjustment.

10. Where there is a bona fide collective bargaining agreement, the act will not apply for an additional year, or at the expiration of the agreement, whichever occurs first.

11. The Secretary of Labor is not given broad regulatory and rulemaking authority.

12. The proposed power of the Secretary of Labor to blacklist Government contractors who allegedly discriminate against women has been eliminated.

PETER FRELINGHUYSEN, JR.
WILLIAM H. AYRES.
ALBERT A. QUIE.
CHARLES E. GOODELL.
ALPHONZO BELL.

ADDENDUM C

88TH CONGRESS
1ST SESSION

H. R. 3861

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 18, 1963

Mrs. GREEN of Oregon introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce and to provide for the restitution of wages lost by employees by reason of any such descrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

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(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

DEFINITIONS

SEC. 3. When used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any

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part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(d) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(e) "Employ" includes to suffer or permit to work.

(f) "Employer" means any person having twenty-five or more employees in any place of employment and includes any person acting directly or indirectly in the interest of an employer in relation to an employee, including any person having the authority to hire, dismiss, and control the work of such employee, but shall not include the United States or any State or political subdivision of a State.

(g) "Employee" includes any individual employed by an employer.

(h) "Wage" paid to any employee includes the reasonable cost, as determined by the Secretary, to the employer

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of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wages paid to any employee.

(i) "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act.

(j) "Secretary" means the Secretary of Labor.

(k) "Labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

SEC. 4. (a) No employer having employees engaged

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in commerce or in the production of goods for commerce shall discriminate, in any place of employment in which his employees are so engaged, between employees on the basis of sex by paying wages at a rate less than the rate at which he pays wages to any employee of the opposite sex in such place of employment for equal work on jobs the performance of which requires equal skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex: *Provided,* That an employer who, on the date of this enactment, is paying a wage rate differential which would be in violation of the Act on its effective date may adjust the lower wage rate as follows:

(1) On the effective date of this Act, all wage rate differentials shall be reduced by an amount equal to 10 per centum of the higher wage rate in effect on the date of enactment;

(2) One year from the effective date of this Act, remaining wage rate differentials shall be reduced by an amount equal to 15 per centum of the higher wage rate in effect on the date of enactment;

(3) Two years from the effective date of this Act any remaining wage rate differential shall be removed.

(b) No employer shall discharge, cause to be discharged,

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discipline, or otherwise discriminate against any employee on account of any action taken by such employee to invoke, enforce, or assist in any manner in the enforcement of the provisions of this Act. No labor organization, or its agents, representing employees of such an employer shall cause or attempt to cause such an employer to discriminate against an individual in violation of this Act.

ADMINISTRATION AND ENFORCEMENT

SEC. 5. (a) The Secretary of Labor—

(1) shall prescribe such regulations and rules as he deems necessary and appropriate for the administration of this Act, including regulations to protect against violation of the wage standards of any other applicable law and to safeguard wage levels in the elimination of wage rate differentials under section 4(a) of this Act;

(2) may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such record (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, and matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act;

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(3) if a violation is found to exist, the Secretary may, before taking further action hereunder, by informal methods of conference, conciliation, and persuasion, endeavor to eliminate discriminatory practices prohibited by this Act and to secure restitution of wages which an employee would have received had the employee been paid at the rate paid the opposite sex as required by this Act and reinstatement to employment where an employee has been discharged in violation of this Act;

(4) may enter and serve upon any employer or labor organization found by the Secretary, after notice and hearing in conformity with sections 5, 6, 7, and 8 of the Administrative Procedure Act, to be engaged in or to have engaged in any violation of section 4 or section 7 of this Act, an order requiring such employer or labor organization (A) to cease and desist from such violation, and requiring such employer (B) to pay to each employee who has been adversely affected a sum equal to the amount of the wages due such employee at the rate paid to an employee of the opposite sex, plus up to an additional amount as liquidated damages not to exceed the back wages found to be due; and

(5) may enter and serve upon any employer found by the Secretary, after notice and hearing as provided in paragraph (4) hereof, to have discharged or otherwise

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discriminated against any employee on account of any action taken by such employee to invoke, enforce, or assist in any manner in the enforcement of the provisions of section 4 or section 7 of this Act, an order requiring such employer to reinstate such employee, or to remove such discrimination, and to pay to such employee a sum equal to the amount of the wages of which such employee has been deprived by reason of such discharge or other discrimination plus up to an additional amount as liquidated damages not to exceed the back wages found to be due.

(b) For the purpose of any investigation or proceeding conducted under this Act, the provisions of section 307 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Power Act of June 10, 1920 (16 U.S.C. 825f), shall be applicable to the jurisdiction, powers, and duties of the Secretary of Labor or any officers designated by him.

(c) The Secretary shall have power to petition any United States district court, within the jurisdiction of which the violation of this Act occurred or such person resides or transacts business, for the enforcement of any order issued under this section and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings. Upon filing of such petition, the court shall cause notice thereof to be served upon such person, and

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thereupon shall have jurisdiction of the proceeding, and shall have power to grant such temporary relief and restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Secretary. No objection that has not been urged before the Secretary or hearing officer shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary or hearing officer, the court may order such additional evidence to be taken before the Secretary or his hearing officer and to be made a part of the record. The Secretary may modify his findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and he shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and shall file his recommendations, if

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any, for the modification or setting aside of his original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals.

(d) Any person aggrieved by a final order of the Secretary issued under paragraphs (4) and (5) of subsection (a) of this section may obtain a review of such order in any United States district court within the jurisdiction of which the action in question was alleged to have been engaged in or such person resides or transacts business by filing in such court within sixty days of such order a written petition praying that the order of the Secretary be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Secretary. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Secretary under subsection (c) of this section, and shall have the same jurisdiction to grant to the Secretary such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Secretary; the findings of the Secretary with

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(e) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Secretary, as provided in this section the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (47 Stat. 70; 29 U.S.C. 101-115).

SUPERVISION OF WAGE PAYMENTS

SEC. 6. (a) The Secretary of Labor is authorized to supervise the payments of any amounts owing to any employee which have been withheld in violation of this Act. Any sum owed an employee and paid to the Secretary under this Act shall be held in a separate account and shall be paid, on order of the Secretary, directly to the employee. Any such sum not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury as miscellaneous receipts.

(b) No wage restitution shall be required with respect to any violation of this Act for any period which preceded by more than two years the date of commencement by the

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Secretary of Labor of the first administrative or judicial proceeding relating thereto.

(c) No person shall be subject to any liability for the commission of any action prohibited by this Act if he pleads and proves that the action complained of was in good faith and in conformity with and in reliance on any written interpretation or opinion of the Secretary.

GOVERNMENT CONTRACTS

SEC. 7. (a) Except as hereinafter provided in this subsection, in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all of the stock of which is beneficially owned by the United States (all of which are referred to hereinafter as agencies of the United States), for the manufacture or furnishing of any materials, supplies, articles, or equipment, in any amount exceeding $10,000, there shall be included stipulations under which the contractor (1) is required to compensate all persons employed by him in the manufacture or furnishing of such materials, supplies, articles, or equipment, in conformity with the requirements of this Act, and (2) shall be subject to all other provisions of this Act. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the

requirement of including the provisions of this subsection in any specific contract.

(b) No contract shall be awarded by the United States or any agency thereof to any person finally determined to have violated any of the provisions of this Act or any stipulation entered into in compliance with subsection (a) of this section, or to any firm, corporation, partnership, or association in which such person has a controlling interest, until or unless the contractor has satisfied the Secretary of Labor that he is complying with his obligation hereunder and that he has in good faith established and will carry out wage policies and practices to assure future compliance. The Comptroller General is authorized and directed to distribute to all agencies of the United States a list containing the names of persons ineligible for contract awards under this section. The Secretary of Labor shall cause the names of persons whom he determines to have made a satisfactory showing of present and future compliance with this Act to be removed from this list.

POSTING

SEC. 8. Every employer subject to this Act shall keep a copy of this Act posted in a conspicuous place in or about the premises where any employee is employed. Employers shall be furnished copies of this Act by the United States Department of Labor on request without charge.

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APPROPRIATION

SEC. 9. There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

EFFECTIVE DATE

SEC. 10. This Act shall take effect one hundred and twenty days after the date of its enactment.

ADDENDUM D

88TH CONGRESS
1ST SESSION

H. R. 5605

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 1963

Mr. GOODELL introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To amend the Fair Labor Standards Act of 1938, as amended, to prevent discrimination because of sex in payment of wages by employers engaged in commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1963".

SEC. 2. Section 6 of the Fair Labor Standards Act of 1938, as amended, shall be amended by adding thereto a new subsection (d) reading as follows:

"(d) (1) Except as otherwise provided in this subsection, no employer having employees engaged in com-

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H. R. 5605, p. 2

merce or the production of goods for commerce shall discriminate, within any establishment in which his employees are so engaged, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the wage rates for employees of the opposite sex in such establishment for equal work or jobs the performance of which requires equal skill, effort, responsibility, and working conditions: *Provided, however,* That such payment shall not be discriminatory within the meaning of this subsection when based upon (i) a seniority system; (ii) a merit system; (iii) a job classification system; (iv) a system which measures earnings by quantity or quality of production; (v) reasonable differentiation based on a factor or factors other than sex; or (vi) ascertainable and specific added costs resulting from employment of the opposite sex, or any combination of these exceptions.

"(2) An employee aggrieved by a violation of this section shall have the same rights and remedies with respect to an unpaid wage differential as section 16 (b) and (c) of this Act confer upon employees aggrieved by unpaid minimum wages or unpaid overtime compensation."

SEC. 3. The amendments made by this Act shall take effect upon the expiration of one hundred and twenty days after the date of its enactment and the Administrator of the Wage and Hour Division is authorized immediately there-

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after to investigate violations of this subsection: *Provided,* That no action, whether for recovery of wages, liquidated damages, or injunctive relief may be brought or maintained based upon any wage payments or action taken or not taken by any employer prior to the expiration of one year from the effective date of these amendments.

ADDENDUM E

88TH CONGRESS
1ST SESSION

H. R. 6060

IN THE HOUSE OF REPRESENTATIVES

MAY 6, 1963

Mrs. GREEN of Oregon introduced the following bill; which was referred to the Committee on Education and Labor

---

A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963,".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

(1) depresses wages and living standards for employees necessary for their health and efficiency;

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(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

SEC. 3. Section 6 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), is amended by adding thereto a new subsection (d) as follows:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures

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earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

"(3) For purposes of administration and enforcement any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act.

"(4) As used in this subsection, the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its

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enactment: *Provided*, That in the case of employees covered by a bona fide collective bargaining agreement in effect at least thirty days prior to the date of enactment of this Act, entered into by a labor organization (as defined in section 6(d) (4) of the Fair Labor Standards Act of 1938, as amended), the amendments made by this Act shall take effect upon the termination of such collective bargaining agreement or upon the expiration of two years from the date of enactment of this Act, whichever shall first occur.

ADDENDUM F

88TH CONGRESS
1ST SESSION

S. 1409

IN THE SENATE OF THE UNITED STATES

APRIL 30, 1963

Mr. MCNAMARA (for himself, Mr. MORSE, and Mr. RANDOLPH) introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

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A BILL

To prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce and to provide for the restitution of wages lost by employees by reason of any such discrimination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Pay Act of 1963".

DECLARATION OF PURPOSE

SEC. 2. (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—

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S. 1409, p. 2

(1) depresses wages and living standards for employees necessary for their health and efficiency;

(2) prevents the maximum utilization of the available labor resources;

(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(4) burdens commerce and the free flow of goods in commerce; and

(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act, through exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct the conditions above referred to in such industries.

SEC. 3. Section 6 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), is amended by adding thereto a new subsection (d) as follows:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, responsibility, and are performed under similar working conditions, except when

such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential which would be in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

"(2) For purposes of administration and enforcement, any amount owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act."

SEC. 4. The amendments made by this Act shall take effect upon the expiration of one year from the date of its enactment.